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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 865

HOMER R. SIMMONS,
Petitioner,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT BEAUMONT, TEXAS

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The opinion of the Court of Civil Appeals is reported: 350 S.W.2d 884, and appended hereto.

GROUNDS OF JURISDICTION

As of October 26, 1961, the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas entered judgment affirming a judgment of the District Court of Jefferson County, Texas, entered February 8, 1961 (App. A1), upon condition that the plaintiff below, Homer R. Simmons, file a remittitur in the amount of $40,000.00, in which event the judgment would be reformed and affirmed in the sum of $99,615.00 (App. A13, following opinion, App. A7-A8, 350 S.W.2d 888). The Court's opinion provided that upon filing of the remittitur "the judgment will be reformed and affirmed for the sum of $99,615.00 * * *." The petitioner filed the required remittitur under protest App. A8), along with a motion for rehearing (App. A10), which was overruled November 15, 19[illegible]. The petitioner then seasonably sought a writ of error from the Supreme Court of Texas, but his application was refused, no reversible error, on January 31, 1962 (App. A14).

On January 26, 1962, the respondent filed with the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas a motion to correct its judgment for the reason that through mathematical error, the Court had awarded petitioner a judgment of $99,615.00, when it should have awarded the sum of $94,715.00 (App. A15). On March 29, 1962, such Appeals Court, long after the judgment had become final by refusal of the application for writ of error, amended the original opinion because of a "clerical error" and struck another $4,900.00 from the recovery of the petitioner, so that he was awarded $94,715.00 through final action of that Court (App. A17).

Statutory Grounds

(1) Jurisdiction to grant this petition is sustained by *Title 28, U.S.C.A., Section 1257 (Subsection 3) (June 25, 1948, C. 646, 62 Stat. 929).*

(2) The statutes of the United States applied by the Court of Civil Appeals and the Texas Supreme Court are *45 U.S.C.A., Sections 51-59 (35 Stat. 65), as amended; 36 Stat. 291, and 53 Stat. 1404.*

(3) Jurisdiction is also sustained by *Title 28, U.S.C.A. Section 1651, Subsection (a). (June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, Sec. 90, 63 Stat. 102).*

QUESTIONS PRESENTED

(1) The first question presented is whether the Court of Civil Appeals denied the petitioner the right of trial by jury in a Federal Employers' Liability Act case in contravention of the Seventh Amendment, by exercising its original discretion, not restricted by the facts adduced on the trial, so as to take from the petitioner $40,000.00; or about a third of the amount awarded him by the jury.

(2) The second question presented is whether the Court of Civil Appeals denied the petitioner a Federal right by disregarding the sound discretion exercised by the trial judge in holding the verdict and judgment not to be excessive, and substituting its original and independent judgment to factually determine the amount of damages to be allowed.

(3) The third question presented is whether the Court of Civil Appeals denied petitioner a Federal right by substituting its independent conclusion of the amount that should have been allowed as damages for that of the jury, despite reasonable support in the record of the trial court's action in holding the jury verdict and judgment not to be excessive.

THE STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's action was brought under the Federal Employers' Liability Act, F.E.L.A. hereafter.[1]

The case involves the Seventh Amendment to the Constitution of the United States, quoted in the margin.[1a].

STATEMENT OF THE CASE

The petitioner sustained severe and permanent personal injuries that terminated in an unsuccessful operation for a herniated lumbar intervertebral disc. Examination of the separate Appendix tendered will show that he endured extreme and continuing pain, and that due to the scar tissue resulting from the operation, he suffers with a nerve root pressure or compression, and has found it necessary to move around at intervals and not remain in one position for long, whether standing or sitting. The strength of his back has been impaired to such extent that he cannot lift weights of any appreciable amount, or climb steps. In addition to the pain in his back, he has a sensation of numbness in his right leg, and has found himself not only unable

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1. 45 U.S.C.A., Sections 51-59 (35 Stat. 65) as amended; 36 Stat. 291, and 53 Stat. 1404. It is thought that the Court's familiarity with these provisions obviates the necessity of setting them out verbatim.

1a. Amendment VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States than according to the rules of the common law. (Amendment VII, U.S.C.A., Constitution Amendments 6 to 14).

to engage in any gainful occupation, but disabled from the performance of any of the work he formerly did about his home, and from hunting or fishing, to the extent that he followed these sports before his injuries.

The petitioner sought medical aid from at least five separate physicians or surgeons, one of whom performed the operation on him. On the trial, only one medical witness, Dr. Heinz K. Faludi, specializing in neurology and neurosurgery, testified concerning his several examinations and treatment of the petitioner. The opinion he gave was that as a residual of the disc removal and operation, the petitioner most likely had radiculitis involving the fifth lumbar and first sacral nerve roots on the right. The doctor had counseled conservative treatment, and then an exploratory reoperation in an effort to relieve the pressure, or if it could not be relieved, the sacrifice of the part of the nerve root involved by cutting it. The general statistics of disc operations would indicate that 20% of the cases would be unimproved, and 10% would actually be made worse after surgery. The doctor's opinion as to the petitioner was that he would not be in the good risk group any more, but probably would be somewhere in the poor risk group. The petitioner had resolved not to go under the knife again.

In the opinion of the medical witness, the petitioner was not in his then condition able to engage in work which required sustained heavy lifting or stooping, bending, and that sort of thing. It was his further opinion that even with a successful disc operation, lifting of 50 lbs. or more would be contra-indicated, but moderate lifting with help of knee action rather than back bending should be possible. Further, that it would be against medical advice for petitioner to do such work as climbing a 12 ft. ladder four times a day, or 6 to 12 times, and he would try to get the

patient assigned to some other type of work, since the climbing would be considered somewhat strenuous for him. The outcome of the operation would be the touchstone on the subject, and if it should fall short of the hopes and expectations for it, the petitioner might fall short of doing the work of a fireman.

The testimony was not in harmony as to the duties required of a fireman and an engineer on a diesel locomotive, but there was proof that these duties required heavy lifting and straining, climbing a ladder from the ground some 8 ft. up to the cab, the making of inspection trips through the units of the locomotive, and effecting such minor repairs as could be done on the road. Furthermore, that the seat of the fireman on the locomotive was right over the truck, so that he received a constant pounding in proceeding across rail joints or low places in the track.

During the three years before his injuries, the petitioner earned an average of some $7,200.00 a year. He was qualified under respondent's seniority system both as an engineer and fireman, and under the wage scale prevailing since the injuries of the petitioner, a fireman would average between $7,500.00 and $8,600.00 a year, while an engineer would average $9,000.00 a year, or maybe a little more. Had he not been injured, there would have been a job as an engineer open to the petitioner from the date of his injuries until the date of trial, and petitioner had some 20 years' seniority with the respondent. The petitioner had made an effort to resume his duties shortly before employing counsel around June 1, 1960, advising a legal representative of the respondent that he was willing to return to work, if the doctor would give petitioner a letter saying he was able to resume all responsibilities of a fireman and locomotive engineer, and if the representative would in turn give petitioner a letter advising that he would accept the doctor's

decision and be responsible for the condition of the petitioner. The representative of respondent declined the offer.

Mortality and annuity tables were received in evidence from which the jury would have been justified in concluding that the present value of an earning capacity of the petitioner of $625.00 per month would be $145.144.37, and that of a $750.00 per month capacity, $174.173.25. Petitioner had a life expectancy of 22.88 years.

The Federal question was timely raised by motion for rehearing filed with the Court of Civil Appeals (App. A10) after that Court applied the Texas rule for measuring damages rather than the Federal rule.

REASONS FOR ALLOWANCE OF THE WRIT

The Texas Rule of Damages

The preceding statement demonstrates that the jury verdict of less than $140.000.00 was not without support in the evidence; indeed, it was capable of being sustained on mathematical computations from the proofs adduced. The trial court, like the jury, thought the amount returned was warranted by the evidence, since he overruled the respondent's motion for new trial setting up alleged excessiveness of the verdict (Tr., State Court, 64). The Court of Civil Appeals did not in its opinion suggest that there was not evidence to support the verdict of the jury; to the contrary, it conceived it to be within its power "to exercise its sound judicial judgment and discretion in the ascertainment of what amount would be reasonable compensation for the injuries sustained, and treat the balance as excess," and thereafter authorized a remittitur of the excess in accord-

ance with its sound judgment.[2] Notwithstanding the fact that apparently both the jury and trial court concluded the disability of petitioner to be total, the Court of Civil Appeals, unrestricted by the proofs made, came to a contrary conclusion, thus: "We do not consider appellee as having been totally disabled (as in other cases cited)" (350 S.W.2d 888, App. A8).[2a]

Perusal of the opinion of the Appeals Court will make manifest the fact that such court not only discarded all thought of respecting any discretion in the trial court, and testing it for abuse, but did not even consider itself confined to the record made in the trial court. This is spelled out in the opinion, which refers to the help received from "precedents," and the claim of a power to adjust the jury verdict so that there should be some "reasonable uniformity as to the amount of verdicts and judgment in the various cases."[3] It would be bad enough for an appellate court to stay within the record made on trial, and arrogate to

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2. App. A7, 350 S.W.2d 887. Reliance was placed upon the Texas Rules of Civil Procedure 328, 439 and 440 (App. A17-A18), as interpreted in *Flanigan* v. *Carswell*, (Sup.) 324 S.W.2d 835.

2a. Some medical authorities question the propriety of a court or jury substituting its judgment for that of the injured party as to the extent of disability. Thus, from "The Estimation of Disability Following Injury," *Journal of the International College of Surgeons*, April, 1960—"the only person that can actually state the degree of disability is the patient himself. Vigorous objection has been raised to the publication of this statement, because it is feared that it gives *carte blanche* to the lying plaintiff and the unscrupulous lawyer. Nevertheless, it is true, and, being true, must be faced. The physician, the judge and the jury may all have opinions concerning the extent to which the person *should* be disabled, but in the final analysis disability is largely a personal matter, dependent upon the injured person's attitude toward the importance of an injury to his physical structure." (*Current Medicine for Attorneys*, September, 1961, p. 9).

3. App. A5, 350 S.W.2d 886.

itself the functions of a jury by rejecting inferences accepted by the jury and accepting inferences rejected by it, but for it to go beyond the record made and strike out for some "reasonable uniformity" as to amounts rendered in various cases, would be little short of crystal gazing.[4] Uniformity in the law there should be, but uniformity of facts in each case, or the inferences to be drawn therefrom, can never be attained. Nor should such a state of affairs be desired.

The danger of leaving with an appellate court "the ascertainment of what amount would be reasonable compensation for the injuries sustained" as an original proposition could nowhere be better illustrated than by what happened to the petitioner in the Court of Civil Appeals in this case. Presumably that Court in "its sound judicial judgment and discretion" determined that a recovery of $99,615.00 would be reasonable compensation for the injuries sustained by petitioner. It entered judgment in favor of the petitioner in this amount (App. A13). Thereafter, the same Court, on the same record, looked at the same judgment rendered by the same trial court and concluded that the judgment for the petitioner, instead of being for $99,615.00 (App. A13) in truth and fact should have been for the amount of $94,715.00 (App. A17). Whether this disparity arose from clerical error

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4. See "Texas Remittitur Practice" by Eugene L. Smith, 14 *Southwestern Law Journal*, No. 2, p. 150 at 157, thus: "It is the writer's personal opinion that a court should not go beyond the record in deciding a question of excess. In holding a jury's verdict excessive, a Court of Civil Appeals should not be allowed to use facts unknown to the jury. If the question of fact were one of evidence to sustain a finding of liability, the only value of decisions in other cases would be in deciding whether the verdict of liability were permissible as a matter of law. The remittitur power is part of the court's power to reverse and remand for a new trial; they should be limited to the record, as in other situations in which they must consider new trials.

or otherwise, it unquestionably shows that in October, 1961, the Court of Civil Appeals considered that a recovery of $99,615.00 by the petitioner would not be excessive, but in March, 1962, after its judgment had become final, the same Court concluded that like Lizzie Borden, after giving the petitioner forty thousand whacks, it might as well give him forty-nine hundred more, and concluded that $94,715.00 would be the highest amount that reason would support as recovery for the petitioner.

As we have said, whether this tossing about of $4,900.00 of the petitioner's recovery came from clerical error, mathematical mistake, or plain carelessness, it definitely shows that the verdict of a jury should not be disturbed on the question of excessiveness unless the trial court has abused its discretion in upholding the amount given. Apparently the Court of Civil Appeals in this case assumed that the judgment followed the verdict, and cut the judgment recovery of the petitioner without even knowing its exact amount!

The singularity of the Texas procedure does not end with the unusual power given the Courts of Civil Appeals to star gaze beyond the record that was before the trial court and jury in arriving at the factual findings such court thinks the jury should have made. The varying rules of remittitur (App. A17-A18) have been interpreted to mean that should the trial court require a reduction of the verdict as a condition for overruling new trial, his discretion in reducing the amount recovered would not be subject to review unless abused, but if the same discretion should be exercised to reject the plea of excessiveness, the Court of Civil Appeals could enter its trip into the great beyond and decide originally whether it thought the verdict ren-

dered was too large or too small.[5] The Texas Rule seems to adhere to the sporting theory of justice, with the dice loaded against the injured party. If the trial court reduces the verdict, the Appeals Court may not restore the amount cut unless the trial court's action was manifestly unjust "in the light of all the facts and circumstances" of the record;[6] but if the same discretionary power of the trial court is exercised to disallow a claim of excessiveness, the Court of Civil Appeals is on its own and may look beyond the facts and circumstances of the record and reverse if it independently considers the verdict too large. This double standard does not address itself well to either policy or logic.

Prior to the decision in *Flanigan*,[7] the Texas Court purported to allow a remittitur only where the verdict was tainted by passion and prejudice.[8] Even after that decision, some of the Texas Courts of Civil Appeals have continued to follow the earlier rule,[9] which gave the jury ver-

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5. *Flanigan* v. *Carswell*, (Sup.) 324 S.W.2d 835 (1959), severely criticized by the Court of Civil Appeals that was forced to apply the rule, 329 S.W.2d 902, 904 (1960).

6. 324 S.W.2d 841.

7. *Ibid.*

8. *Galveston, H. & S. A. R. Co.* v. *Hynes*, 50 S.W. 624, Tex. Civ. App. 1899, eff. ref.; 29 *Texas Law Review* 347, 351; *Henwood* v. *Moore*, 203 S.W.2d 973, 976 (1947), where court made express finding that the jury was influenced by passion, sentimentality, or some other improper motive; *Sharpe* v. *Minor*, 256 S.W.2d 890; *Pruett* v. *Mabry*, 263 S.W.2d 532, 539; 17 Tex. Jur. 2d, Damages, Sec. 341, p. 415; *Texas & N. O. R.* v. *Haney*, 144 S.W.2d 677 (1940), err. dism., cor. judg.

9. For example, see the following F.E.L.A. cases: *Missouri Pacific R. Co.* v. *Mendoza*, 330 S.W.2d 622, 630; *T. & N. O. R. Co.* v. *Perez*, 346 S.W.2d 369, 373; *Missouri Pacific R. Co.* v. *Ramirez*, 326 S.W.2d 50, 55; *Missouri Pacific R. Co.* v. *Kimbrell*, 326 S.W.2d 720, aff'd 334 S.W.2d 283; *Missouri Pacific R. Co.* v. *Young*, 335 S.W.2d 679; and *Missouri Pacific R. Co.* v. *Handley*, 341 S.W.2d 203, 205.

dict and the trial court's action in rejecting a claim of excessiveness the benefit of the doubt.

It is believed that the cases last footnoted apply a different test to that prescribed by the Texas Supreme Court in *Flanigan*,[10] and if this be true, the F. E. L. A. claimant will find that the measure of his rights under the Federal Act varies not only to the extent of the variation between the Texas and Federal rule generally, but in accordance with where his case is reviewed on appeal. Since there are eleven Courts of Civil Appeals in Texas,[11] and the Texas Supreme Court has and exercises power to transfer cases from one to the other in equalization of their dockets,[12] the sport and variety of appellate review is increased. Additional zest is assured in searching for the touchstone of "reasonable uniformity as to the amount of verdicts and judgments in the various cases"[13] by the holding of the Supreme Court that it has no jurisdiction to review the factual question of excessiveness,[14] the judgment of the Courts of Civil Appeals being final on the facts of the case.[15] Prior to the *Flanigan* decision, in 1958 the Supreme Court described a holding that a verdict was excessive as being one where "there is no rule prescribing the manner by which the court determines the amount of remittitur."[16]

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10. 324 S.W.2d 841.

11. Art. 1817, Vernon's Annotated Civil Statutes of Texas, V.A.C.S., hereafter.

12. Art. 1738, V.A.C.S. (material portions copied Appendix A18-A19).

13. Opinion herein, App. A5, 350 S.W.2d 884, 886.

14. *Flanigan* v. *Carswell*, 324 S.W.2d 835, 839.

15. Art. 1820, V.A.C.S., reading: "The judgments of the Courts of Civil Appeals shall be conclusive in all cases on the facts of the case."

16. *Adams* v. *Houston Light & Power Co.*, 314 S.W.2d 826, 830.

We do not think we have unfairly characterized the state of the Texas law on the question of excessive damages. Considered most charitably, it conceives the power of the Court of Civil Appeals to embrace a weighing of the evidence adduced on the trial with the substitution of its conclusion for that of the jury and trial court as to the amount of damages that should have been allowed; but more accurately, the courts determine the amount of remittitur by independently deciding what they consider would have been a reasonable verdict, and then arbitrarily declaring the remainder to be excess.

The Federal Rule

It is elemental that in treating of F. E. L. A. cases, the state courts must apply the rule of decisions of the Federal courts.[17] The principle has been accepted as applicable to rules with respect to the amount and proper measure of damages, said to be inseparably connected with the right of action under the F. E. L. A.[18] The Federal rule requires respect for the jury verdict attacked for excessiveness to the extent of demanding that the action of a

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17. *N. Y. C. R. Co.* v. *Winfield*, 244 U.S. 147, 61 L. Ed. 1045, and cases cited in the opinion; 12 A.L.R. 698; 36 A.L.R. 917.

18. *Chesapeake & O. R. Co.* v. *Kelly*, 241 U.S. 485, 60 L. Ed. 1117; *G. C. & S. F.* v. *Moser*, 275 U.S. 133, 72 L. Ed. 201 (charge on present cash value of damages recovered); *Chicago, R. I. & P. R. Co.* v. *Devine*, 239 U.S. 52, 60 L. Ed. 140 (refusal to limit F.E.L.A. damages for death to $10,000.00 as required by Illinois statute); *Louisiana & Arkansas R. Co.* v. *Pratt*, 142 F.2d 847, 848; *Briggs* v. *Penn. R. Co.*, 164 F.2d 21, aff'd 334 U.S. 304, 92 L. Ed. 1403 (dealing with interest to be allowed on judgment, and both holding measure of damages inseparably connected with F.E.L.A. under which actions brought); *Texas Pacific-Missouri Pacific Term. R. Co. of New Orleans* v. *Welsh*, (1950) 179 F.2d 880, 882 (duty of appellate courts to reduce excessive verdict required by Louisiana law held inapplicable to case brought under F.E.L.A.)

trial court in denying a new trial sought on such grounds must be upheld if it has support in the record.[18a]

In no area has the battle of the majority of this Court to breathe life and meaning into the F. E. L. A. raged more vigorously than on the subject of trial by jury under the Act. To emphasize the importance of the questions raised in this petition, we beg leave to outline the obstacles earlier placed in the way of recovery under the Act by both State and Federal courts, to indicate the slow and painful development of the conception finally evolved by the majority of this Court.

Before 1939

The exception of employees injured through the violation of safety appliance acts from the bar of assumption of risk[19] was seized upon as a means of stringently curtailing the rights of those whose actions did not fall within the reach of the Safety Appliance Act.[20] The cases annotated as indicated in the last footnote subjected the employee under the Act to the assumption of risk of everything from defective track and insufficient clearance to negligent movement of cars and engines, so long as the danger was obvious or known.

Other strictures on recovery arose from a rigid construction of the requirement that the employee be injured

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18a. *Nesse* v. *Southern R. Co.*, 350 U.S. 77, 100 L. Ed. 60, 61. Also see *U. S.* v. *Guyer*, 218 F.2d 266, 269, reversed as *Snyder* v. *U. S.*, 350 U.S. 906, 100 L. Ed. 796 (*post*, 30 *et seq.*).

19. 45 U.S.C.A., Sec. 54, April 22, 1908, c. 149, Sec. 4, 35 Stat. 66.

20. *Gila Valley G. & N. R. Co.* v. *Hall*, 232 U.S. 94, 58 L. Ed. 521; *Seaboard Airline R. Co.* v. *Horton*, 233 U.S. 492, 58 L. Ed. 1062, and *C. & O.* v. *DeAtley*, 241 U.S. 310, 60 L. Ed. 1016. U.S.C.A. carries 246 footnotes, covering 141 pages following Sec. 54 (Sec. 4) of the Act (45 U.S.C.A. 54, pp. 114-256).

while employed in interstate commerce.[21] The hapless employee prior to 1939 might find himself moving within and without the reach of the F. E. L. A. many times in the course of a single switching operation.[22] The shop-worker fared no better, and might find himself covered by the Act in the front shop, where minor repairs were being made on locomotives not withdrawn from service, but beyond its reach when he strolled into the back shop to do work on a locomotive that had been withdrawn for an overhaul.[23] The construction worker, once off the interstate highway,[24] found his coverage under the Act governed by the happenstance of whether the instrumentality on which he was working had been dedicated to interstate commerce,[25] or whether the work was "new construction" or renovation of old.[25a]

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21. 45 U.S.C.A., Sec. 51: Annotations, pp. 230-324: Notes 261-376.

22. For example, see *Illinois C. R. Co.* v. *Behrens*, 233 U.S. 473, 478, 58 L. Ed. 1051, 1055; *Chicago & Eastern Ill. R. Co.* v. *Industrial Commission of Illinois*, 284 U.S. 296, 76 L. Ed. 304; and *Chicago, B. & Q. R. Co.* v. *Harrington*, 241 U.S. 177, 180, 60 L. Ed. 941, 942, where the fact that coal being switched was to go into both intrastate and interstate locomotives and that switchman previously had been engaged in interstate commerce, and it was contemplated he would be so engaged after his immediate duty of moving intrastate freight was completed, was held insufficient to bring him within the Act.

23. *New York, N. H. & H. R. Co.* v. *Bezue*, 284 U.S. 415, 419, 76 L. Ed. 370, 374; *Industrial Accident Commission* v. *Davis*, 259 U.S. 182, 187, 66 L. Ed. 888, 892.

24. *Kinzell* v. *Chicago, M. & St. P. R. Co.*, 250 U.S. 130, 63 L. Ed. 893; *Pedersen* v. *Delaware L. & W. R. Co.*, 229 U.S. 146, 57 L. Ed. 1125.

25. *Shanks* v. *Delaware L. & W. R. Co.*, 239 U.S. 556, 559-560, 60 L. Ed. 436, 438; *Minneapolis & St. L. R. Co.* v. *Nash*, 242 U.S. 620, 61 L. Ed. 531

25a. *Raymond* v. *Chicago M. & St. P. R. Co.*, 243 U.S. 43, 45, 61 L. Ed. 583, 585; *New York C. R. Co.* v. *White*, 243 U.S. 188, 192, 61 L. Ed. 667, 670.

Judicial restriction of rights under the Act was even extended to operate after the death of the employee, and although Congress had gone to great pains to leave out of the Act provisions fatal to the Lord Campbell type of death act, judicial interpretation added them.[26] At the other extremity, one actually serving as a switchman was denied recovery because he had procured his employment through fraudulently concealing a physical ailment, albeit the ailment had no causal relation to his later injuries.[27]

In the early 20's, a state statute making it the personal duty of an engineer when approaching a crossing with another railroad to stop and ascertain that the train could safely resume its course was held to impose upon the engineer the sole duty of avoiding collision, even though his fireman on the opposite side of the enginer from which the colliding train approached was in better position to observe it.[28] This conception of "primary" or "positive" duty capable of excluding recovery although the negligence of other employees may have contributed as a proximate cause to the death of the deceased employee was reapplied in 1924[29] and 1928.[30] Needless to say, this interpretation

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26. *Mellon* v. *Goodyear*, 277 U.S. 335, 344, 72 L. Ed. 906, 910.

27. *Minneapolis, St. P. & S. Ste. M. R. Co.* v. *Rock*, 279 U.S. 410, 414-415, 73 L. Ed. 766, 770. Rock had flagged a physical examination, and in the course of the opinion, it was held that his duty to disclose his identity and physical condition was a continuing wrong against the defendant. Apparently the railroad did not counterclaim for wages paid prior to Rock's injuries.

28. *Frese* v. *Chicago, B. & Q. R. Co.*, 263 U.S. 1, 3, 68 L. Ed. 131, 132. To quote: "Whatever may have been the practice, he (the engineer) could not escape this duty (to ascertain if the train could safely resume its course), and it would be a perversion of the (F.E.L.A.) to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more."

29. *Davis* v. *Kennedy*, 266 U.S. 147, 148, 69 L. Ed. 212, 216.

30. *Unadilla Valley R. Co.* v. *Ernest Caldine*, 278 U.S. 139, 141, 73 L. Ed. 224, 232.

nullified the Congressional intent of permitting recovery where injury or death of an employee results "in whole or in part from the negligence of any of the officers, agents or employees of such carrier." It will be observed that the Act did not confine recovery to instances of negligent contribution by "superior" officers, agents or employees, but the cases footnoted read such limitation into its provisions.

We have thus far treated of what are believed to be judicial barricades erected between the employee injured under the F. E. L. A. and recovery by him or his beneficiaries. In our humble opinion, however, the worst blow to the basic purpose and philosophy of the Act was delivered in those cases where the right and extent of recovery depended upon a jury determination of factual issues. It is in this most sensitive area that the beneficent purposes of the Act have undergone the strongest assault. As an example of the critical judicial eye turned upon verdicts favorable to employees or their beneficiaries may be cited those where the verdict was said to have rested on "conjecture and speculation"[31] or upon building an inference upon an inference.[32]

Equal judicial concern was shown to assure that a jury verdict on causal negligence was supported by positive rather than inferential evidence. Thus, where a brakeman

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31. *Gulf, M. & N. R. Co.* v. *Wells*, 275 U.S. 456, 458, 72 L. Ed. 370, 372. Despite the positive testimony of one situated ten car lengths away from an engine that "the engine gave an unusual jerk", the statement was held to be a mere conjecture, incapable of supporting a charge of negligence.

32. *Penn. R. Co.* v. *Chamberlain*, 288 U.S. 333, 339, 77 L. Ed. 819, 823. The testimony of an eye witness as to hearing a "loud crash" and shortly thereafter seeing a string of cars that had been following another string at a greater rate of speed moving along together was held to afford no inference of a collision between the cars, or merely to afford equal support to each of two inconsistent inferences, which in turn was held insufficient to take the question to a jury.

was last seen alive while running westwardly by the side of a train moving in that direction, and blood was found upon the rail 8 or 10 feet west of a defect in the pathway commonly used by trainmen, together with a footprint in the soft area that "looked as though somebody that was heavy or running had stepped in it," nothing but conjecture as to the cause of fatal injury was said to exist.[33] Perhaps the keystone to the pre-1939 approach of the courts to the consideration of the factual support of a jury verdict in F. E. L. A. cases is explained by this quotation from the opinion in the case last footnoted:

> "The cause is one of a peculiar class where we have frequently been obliged to give special consideration to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the Liability Act as here interpreted."

Eight years after *Saxon*, the picture began to change.

After 1939

The F. E. L. A. was amended by Congress in 1939 to extend exemption from assumption of risk by the employee to cases based on ordinary negligence as well as those based on the violation of the Safety Appliance Act.[34] and so as to broaden the coverage under the conception of interstate commerce.[35] Soon after the amendment, a welcome change could be discerned in the judicial approach to a consideration of the protection afforded by the Act. The art of semantics which would have transformed the earlier conception of assumed risk to a rule of "no duty," or "no negligence," was forcefully and admirably rejected by this Court

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33. *Atchison, T. & S. F. R. Co.* v. *Saxon*, 284 U.S. 458, 459, 76 L. Ed. 397, 399.

34. August 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U.S.C.A., Sec. 54.

35. 45 U.S.C.A., Sec. 51.

in 1940.[36] It was not until 1955 that the "moment of injury" and "new construction" doctrines with respect to engagement in interstate commerce were swept into the dust bin, but the sweep was a clean one.[37] On the same day, an effort to limit the benefits of the Act "to those who have cinders in their hair, soot on their faces, or callouses on their hands," was rejected by the holding that a railroad's clerical employee was covered thereby.[38]

Far more dramatic than the acceptance of fresh conceptions of the interpretation of legal terms has been the successful effort of the majority of this Court since 1939 to rescue the right of trial by jury under the F. E. L. A. from the serious injury done it by the philosophy so well expressed in *Saxon*.[39] A partial but admirable treatment of this restoration up to 1956 is found in an article by Prof. Leon Green, published in 65 *Yale Law Journal* at page 482, 488, *et seq.* Without placing blame on a former teacher, we

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36. *Tiller* v. *Atlantic Coast Line R. Co.*, (1940) 318 U.S. 54, 87 L. Ed. 610. On subsequent appeal, 323 U.S. 574, 89 L. Ed. 465. The concurring opinion gives a clue to the basis of later schisms on the Court with respect to the F.E.L.A. Also see *Blair* v. *Baltimore & O. R. Co.*, 323 U.S. 600, 89 L. Ed. 490.

37. *Southern P. Co.* v. *Gileo*, 351 U.S. 493, 499-500, 100 L. Ed. 1357, 1365.

38. *Reed* v. *Penn R. Co.*, 351 U.S. 502, 506, 100 L. Ed. 1366, 1374. The dissenters seemed willing to abandon the requirement that an employee's work must relate to interstate transportation at the moment of injury, but complained that it was "not necessary to jump over the moon and wipe out the basic distinction between those whose duties are tied to transportation * * * and those * * * who are exposed by way of permanent occupation to no greater or different potential hazards than are the thousands upon thousands of like workers in offices other than those of railroads * * *."

39. *Atchison, T. & S. F. R. Co.* v. *Saxon*, 284 U.S. 458, 459, 76 L. Ed. 397, 399 (*supra*, 19).

gratefully acknowledge that our approach has been inspired by his treatment of the subject.

The troublesome quadruplets of "speculation and conjecture"[40] and "inference upon inference"[41] were laid in well-deserved and dishonorable graves in 1946 by the majority of the Court.[42] Earlier, the Court had taken occasion to say that the right to trial by jury is part and parcel of the remedy afforded under the F. E. L. A.,[43] and that the essence of the jury's function was to select from conflicting inferences and conclusions that considered most reasonable which, when found, "whether it relates to negligence, causation, *or any other factual matter*, cannot be ignored."[44]

The luxury of reshaping a jury finding under the F. E. L. A. was far too well engrained in the lower appellate courts for ready acceptance of the pronouncements just summarized. It was necessary for this Court to remark in 1949 that an opinion of the Supreme Court of a state "strongly indicated, as the dissenting judge pointed out, that its finding of an absence of negligence on the part of the railroad

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40. *Gulf, M. & N. R. Co. v. Wells*, 275 U.S. 456, 458, 72 L. Ed. 819, 823 (*supra*, 18)

41. *Penn. R. Co. v. Chamberlain*, 288 U.S. 333, 339, 77 L. Ed. 819, 823 (*supra*, 13)

42. *Lavender v. Kurn*, 327 U.S. 645, 653, 90 L. Ed. 916, 923. Recently, *Rock* (*supra*, 17), was not buried, but relegated to limbo by confinement of its reach to cases involving the precise fact question there determined. The concurring opinion contained a judicial whimsy to the effect that it was trusted that the limitation did not mean that the plaintiff must be named Rock; a limitation that the writer would gleefully impose from his partisan standpoint. See *Still v. Norfolk & Western Ry. Co.*, 7 L. Ed. 2d (Adv.) 103, 82 S. Ct. , U.S.

43. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354, 87 L. Ed. 1444, 1448.

44. *Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35, 88 L. Ed. 520, 525.

rested on that court's independent resolution of conflicting testimony."[45] The case was further notable for its bold renunciation of the doctrine that simply because issues of negligence are left to a jury, the railroads are made insurers, a sentiment said to rest on the unarticulated assumption that juries will invariably decide negligence questions against railroads, which is contrary to fact.[46] Additionally, the concurring opinion in the case bluntly asserted that the F. E. L. A. was designed "to put on the railroad industry some of the cost of the legs, eyes, arms and lives which it consumed in its operations. Not all of these costs were imposed, for the Act did not make the employer an insurer."

The October, 1956, term of this Court may well be considered as a landmark in the efforts of the majority of the Court to preserve the integrity of the jury system in F. E. L. A. cases, "over vigorous dissent that the time taken with these cases was not well spent."[47] First, a judgment of the Supreme Court of Missouri was set aside in an opinion that eschewed treatment of the refinements of negligence and proximate causation, and emphasized that the test of whether a jury case is made under the statute "is simply whether the proofs justify with reason the conclusion that the employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."[48]

On the same date of the *Rogers* opinion, three other cases were decided, in one of which the proof was held in

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45. *Wilkerson v. McCarthy*, 336 U.S. 53, 55, 93 L. Ed. 497, 501.

46. *Id.*, 336 U.S. 62, 93 L. Ed. 504.

47. *Calabrotto v. New York, N. H. & H. R. Co.*, 287 F.2d 394 through Clark, Circuit Judge, 2nd Cir.

48. *Rogers v. Mo.-Pac. R. Co.*, 352 U.S. 500, 506, 1 L. Ed. 2d 493, 499.

sufficient to raise an issue of negligence.[49] Other memorandum opinions made plain that *Rogers* was to be the accepted test henceforth.[50] At the next term of the Court, the remnants of the approach employed in *Saxon*[51] were shattered in a case where the circumstances surrounding unwitnessed fatal injuries were not so strong as those surrounding the death of Saxon.[52]

The Texas Outlook

Unquestionably, as the philosophy of this Court operated to liberalize the F. E. L. A. after 1939 in favor of the employee, that of the appellate courts of Texas moved in the opposite direction. The Texas Courts assuredly fell within the category described in this quotation from the *Rogers* opinion: "Special and important reasons for the grant of certiorari in these (F. E. L. A.) cases are certainly present when lower Federal and state courts persistently deprive litigants of their right to a jury determination" (*Rogers*, 352 U.S. 510, 1 L. Ed. 2d 502).

During the 1956 term, a judgment of the Seventh Court of Civil Appeals of Texas had to be reversed to compel respect for a jury finding of negligence and Federal rights that were being denied under the guise of following local practice.[53] At the next term of Court, it was necessary

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49. *Herdman v. Penn. R. Co.*, 352 U.S. 518, 1 L. Ed. 2d 508.

50. *Shaic*, 353 U.S. 920, 1 L. Ed. 2d 718; *Futrelle, Admx., v. Atlantic Coast Line R. Co.*, 353 U.S. 920, 1 L. Ed. 2d 718; *Thompson v. Texas & Pac. R. Co.*, 353 U.S. 926, 1 L. Ed. 2d 722.

51. *Atchison, T. & S. F. R. Co. v. Saxon*, 284 U.S. 453, 459, 76 L. Ed. 397, 399, *supra* 14.

52. *Stevens v. Atlantic Coast Line R. Co.*, 355 U.S. 52, 2 L. Ed. 2d 93.

53. *Arnold v. Panhandle & S. F. R. Co.*, 350 U.S. 360, 1 L. Ed. 2d 889.

to reverse the Supreme Court of Texas in an F. E. L. A. case where it had attempted to apply the "Mother Knows Best" principle in testing safety measures applied to a yard built to "specifications advanced and approved by the best qualified construction engineers in America."[54] Deserving of special treatment, however, is the saga of Earl R. Deen, whose F. E. L. A. case progressed in and out of the Texas courts and this Court over a period of years.

The Eleventh Court of Civil Appeals reversed and rendered judgment against Deen on the ground that there was no evidence of employer negligence under the Act.[55] In due course, the Appeals Court judgment was reversed here, by memorandum opinion.[56] Despite a show of some judicial pique, the Appeals Court accepted this Court's judgment, and although considering itself precluded from holding the jury verdict against the overwhelming weight and preponderance of the evidence, nevertheless exercised its power of requiring a remittitur in the sum of $5,500.00.[57] The Texas Supreme Court reviewed the last Appeals Court judgment, holding that such court had the same powers as a trial judge in the matter of upholding or setting aside verdicts "by reason of evidence or deficiency therein."[58] In the course of the opinion that remanded the case to the Court of Civil Appeals, the Texas Supreme Court directed that Court to adjudicate upon its own independent

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54. The quotation: 298 S.W.2d 106; the case: *Gibson v Thompson*, 355 U.S. 18, 2 L. Ed. 2d 1.

55. *Gulf, Colorado & Santa Fe R. Co. v. Deen*, 275 S.W.2d 889.

56. *Deen v. Gulf, Colorado & Santa Fe R. Co.*, 353 U.S. 529.

57. *Gulf, Colorado & Santa Fe R. Co. v. Deen*, 306 S.W.2d 171, 174-175.

58. *Gulf, Colorado & Santa Fe R. Co. v. Deen*, 312 S.W.2d 933, 937.

evaluation of the evidence and wholly apart from the judgment of the Supreme Court of the U. S. whether or not the finding of negligence below was so against the weight of the evidence as to require a new trial in the interest of justice. In order to prevent the Texas Supreme Court from requiring the Court of Civil Appeals to substitute its judgment not only for that of the jury, but of the U. S. Supreme Court, it was necessary to invoke this Court's power of mandamus.[59] Again back in the Texas Supreme Court, Deen requested that the amount ordered remitted be restored, since the F. E. L. A. does not contemplate the granting of remittiturs, but this was refused, albeit with one strong dissent.[60]

Earlier in the proceedings, Deen had filed a remittitur "in the hope of terminating the litigation but reserving the right to complain of the action of the Court of Civil Appeals as depriving him of the right of trial by jury under the F. E. L. A., if Santa Fe refused to accept the remittitur and prolonged the litigation" (Application for Certiorari No. 698, pp. 2 and 9, *Earl R. Deen, Petitioner, v. Gulf, Colorado & Santa Fe Ry. Co.*). Deen's desire to be done with the Texas appellate courts is understandable, but whether the language used was considered by this Court as indicating a willingness to accept the remittitur or not, his application for certiorari was denied, with Mr. Justice Douglas indicating his opinion that certiorari should be granted.[61]

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59. *Earl R. Deen v. Hon. J. E. Hickman et al.*, 358 U.S. 57, 3 L. Ed. 2d 28.

60. *Gulf, Colorado & Santa Fe R. Co. v. Deen*, 317 S.W.2d 913, 915.

61. *Earl R. Deeen, Petitioner, v. Gulf, Colorado & Santa Fe R. Co.*, 359 U.S. 945, 3 L. Ed. 2d 678.

Although this Court has said, that, "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times,"[62] the Texas Supreme Court has concluded that the denial of the writ in Deen thenceforward placed authority in the Courts of Civil Appeals to require remittiturs.[63]

The Heel of Achilles

At the risk of tedium, we have brought the Court to the query of whether "the sustained efforts of the Supreme Court majority to preserve the integrity of the jury system"[64] in F. E. L. A. cases are to come to naught through the device of ignoring the jury's conclusion as to the correct *amount* that should be awarded an injured employee. Does there remain, despite the valiant efforts of the majority of this Court, an Achilles' heel which leaves the Federal rights of the employee under the F. E. L. A. vulnerable to destruction in the guise of requirements of remittiturs? Is it not a matter of small moment whether the "lower Federal and state courts persistently deprive litigants of their right to a jury determination" in the realm of primary liability, or in that of the proper amount of damages found by the jury? Why should the scope of the *Tennant* opinion[65] preserving for the jury the right to make what it considers the most reasonable conclusion "whether it relates to negli-

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62. *Atlantic Coast Line R. Co. v. Powe*, 283 U.S. 401, 403-4; 75 L. Ed. 1142, 1143.

63. *Missouri Pac. R. Co. v. Kimbrell*, 334 S.W.2d 283, 287. The confusion has spread to Illinois, where the same conclusion has been expressed. (*Smith v. Ill. Cent. R. Co.*, (Ill. App.) 172 N.E.2d 803, 804).

64. *Calabritto v. New York, N. H. & H. R. Co.*, 287 F.2d 394, through Clark, Circuit Judge, 2nd Cir.

65. *Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35, 88 L. Ed. 520, 525, *supra* 21.

gence, causation, *or any other factual matter*" be limited to factual matters other than those pertaining to damages? Is there more reason to deny the Supreme Court of a state the right to rest its finding of an absence of negligence on the Court's independent resolution of conflicting testimony,[66] than to deny a state appellate court the right to find lesser damages than awarded by a jury, based on its independent resolution of conflicting testimony and a consideration of amounts awarded in other cases?

In the present case, the Appeals Court considered in October, 1961, that $99,615.00 was a reasonable recovery for the petitioner herein. The uninitiated observer might conclude that this was indeed appellate sharp shooting, yea, down to dollars of the first digit. The skeptical might ask, why not $98,000? Why not $100,000? Or, $96,000? These are not invalid questions, for the same Court that considered that the sum of $99,615.00 would be a reasonable recovery for the petitioner in October, 1961, has come to the conclusion that the figure pounced upon was the result of a clerical error, and that in truth the reasonable recovery of the petitioner, on the same record, with the same injuries, the same trial court judgment, and the same chances of future employment of the petitioner was, on March 29, 1962, the sum of $94,715.00 (App. A17).

In this case, the Court lopped off almost a third of the petitioner's recovery. There is no reason for saying that in future F. E. L. A. cases it may not lop off a half, two-thirds, three-fourths, or 99%. Indeed, the same Court which found the varying amounts of October, 1961 and March, 1962, as the proper quantum of recovery by petitioner a little earlier found that less than one-fourth of the recovery allowed after a trial court requirement of

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66. *Wilkerson* v. *McCarthy*, 336 U.S. 53, 55, 93 L. Ed. 497, 501.

$38,500.00 remittitur was reasonable, and slashed the verdict of the jury by 75.420733% of the amount allowed to stand by the trial court. The net result of the two reductions for excessiveness operated to take away 84.5[illegible]6% of the verdict of $103,785.00 actually awarded by the jury.[67]

With the appellate courts free to cut and slash a jury verdict in this manner, a Federal right subject to such assault amounts to no right at all. But the peril does not end with the power of reduction; the Texas Supreme Court reserves unto itself the right to destroy a jury finding of damages in its entirety. This power was claimed prior to the decision in *Flanigan*[68] in the *Hicks* case,[69] and exercised as late as March 10, 1962.[70] In the case last noted, the Court of Civil Appeals reduced exemplary damages from $10,000 to $5,000.00 because excessive, and the Supreme Court of Texas granted an application for writ of error on the point that a new trial should have been granted because the damages were so grossly excessive as to manifest passion and prejudice and a complete disregard of the evidence by the jury. This principle, in our humble opinion, is in complete disagreement with the decision of this Court in the *Neese* case,[71] in which it will be remembered that the Circuit Court for the Fourth Circuit attempted to exercise just such a power of disregarding a jury verdict of damages because it was not supported

67. *Texas & N. O. R. Co.* v. *Broadway*, 345 S.W.2d 814, 821.

68. *Flanigan* v. *Carswell*, 324 S.W.2d 835.

69. *World Oil Co.* v. *Hicks*, 103 S.W.2d 962.

70. See *Ware* v. *Paxton et al.*, 5 Tex. S. Ct. Journal No. 22, p. 301; op. rep. C.C.A. 352 S.W.2d 520.

71. *Neese* v. *Southern Railway Co.*, 350 U.S. 77, 100 L. Ed. 60 (post 30).

by the record.[72] To summarize, the Federal rule does not permit disregard of a jury verdict on damages where the action of the trial court in upholding it has support in the record, but the Texas rule permits the setting aside of a jury verdict that has support in the record if it occurs to the Texas Supreme Court that it is so excessive as to manifest passion and prejudice on the part of the jury.

If this be the law in F. E. L. A. cases, then it matters not how solicitous this Court may be of trial by jury on liability issues. The appellate courts will simply take away with their left hand what this Court has required them to bestow with their right hand.

The Federal Rule vs. the Texas Rule

There can be no doubt that the rule of damages as applied in Texas is at war with all conceptions of the Federal rule. We say "all conceptions" in light of the fact that it is our belief that the Federal rule could stand some clarification.[73] Earlier Federal decisions seem to restrict appellate review to law questions alone, and deny the existence of any right of appellate review of facts found by a jury.[74] In 1955, this Court found it unnecessary to pass on the constitutional question we raise, but did make it clear

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72. Ib., 216 F.2d 772, 776.

73. This is demonstrated by the treatment of the subject of Prof. Moore in *Moore's Federal Practice*, Vol. 6, pp. 3833-3841.

74. For example, see *Herencia* v. *Guzman*, 219 U.S. 44, 45, 55 L. Ed. 81; *Southern Ry. Co.-Carolina Division* v. *Bennett*, 233 U.S. 80, 87, 58 L. Ed. 860, 863; *Dimick* v. *Schiedt*, 293 U.S. 479, 79 L. Ed. 603, 611; *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 77 L. Ed. 439, 445, wherein Mr. Justice Brandeis gave this helpful admonition: "Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct."

that in passing on the question of excessiveness of damages appellate review was restricted to a consideration of whether the action of the trial court in denying a new trial based on the grounds of alleged excessiveness had support in the record.[75] The writer thinks the *Neese* test has the virtue of stability, and if it is to be considered that there is no constitutional inhibition to appellate review of the amount of damages awarded, that it should be pronounced on review of this case to end the confusion found among the various Circuit Courts of Appeal as well as state appellate courts. For example, we find some Circuit Courts approaching the question of excessiveness in reliance upon the notion first brought forward in *Barry v. Edmonds*, 116 U.S. 550, 565, that the verdict must be so outrageous as to demonstrate that the jury acted on passion and prejudice, as approved as late as 1949 in *Affolder v. New York C. & St. L. R. Co.*, 339 U.S. 96, 94 L. Ed. 683, 688, by use of the word "monstrous."[76] In other Federal Circuits, adherence is yet given to the view that the appellate courts have no power to review a jury finding of damages.[77] Closely related to the view maintained in those circuits that require a verdict to be monstrous, fantastic, outrageous, etc., before even the trial court can interfere with the same, is the conception in other circuits

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75. *Neese v. Southern R. Co.*, 350 U.S. 77, 100 L. Ed. 60, 61. Also see *U. S. v. Guyer*, 218 F.2d 266, 269, rev. as *Snyder v. U. S.*, 350 U.S. 906, 100 L. Ed. 796.

76. *Northern Pac. R. Co. v. Everett*, 232 F.2d 488, 495; *LaFrance v. New York, New Haven & Hartford R. Co.*, 292 F.2d 649, 650; *C. & O. R. Co. v. Newman*, 243 F.2d 804; *Hulett v. Brinson*, 229 F.2d 22, cert. den. 76 S. Ct. 659. We have cited but a few cases as samples.

77. *St. Louis S. W. R. Co. v. Ferguson*, 182 F.2d 949, 954, *et seq.*, and cases there treated. *Moore's Federal Practice*, Vol. 6, p. 3834.

that an abuse of discretion of the trial court must be shown before there may be appellate review on the question of excessiveness.[78] In short, there is no uniformity in the opinions of the various Federal Circuit Courts on the subject.

Perhaps the most exhaustive treatment of the divergence of opinion among the various circuits is found in *Dagnello* v. *Long Island R. Co.*, 289 F.2d 797. The Second Circuit there rejects all suggestion that there may be no appellate review on the question of excessiveness of a verdict, but it strongly and clearly points out that it considers the review made must be on a question of law. In last analysis, the opinion confines the right of review to cases where the trial court may be said to have abused his discretion in overruling a motion for new trial based on excessiveness of the verdict.

Under no possible interpretation of the Federal rule could it be said that the test applied in Texas (*supra*, pp. 8-14) is consistent therewith.

The Rule of Practice

Some state Courts have concluded that the determination of a contention of excessiveness of a verdict is one of mere procedure, governed by the law of the state, rather than the Federal decisions under the F. E. L. A.[79] On the other hand, in construing the Jones Act (46 U.S.C.A., Sec. 688), which simply adopts the F. E. L. A. provisions

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78. *McCoy* v. *Cate*, (1 Cir.) 117 F.2d 194; *Moore's Federal Practice*, Vol. 6, p. 3836, *et seq.*

79. See, for example, *Joice* v. *M., K. T. R. Co.*, 189 S.W.2d 568, 161 A.L.R. 383, 394; *Counts* v. *Thompson*, (Mo.) 222 S.W.2d 487, 495; *Avance* v. *Thompson*, (Ill. App.) 51 N.E.2d 334, 340, reversed on other grounds, 55 N.E.2d 57, cert. den. 323 U.S. 753; and *Rivera* v. *Atchison, T. & S. F. R. Co.*, (N. M.) 299 P.2d 1090.

as to seamen, the Supreme Court of Oregon felt compelled to apply the rule of Federal decisions on the question of excessiveness of a verdict even to the extent of remanding a cause to the trial court to determine whether a new trial should be granted on the ground of excessive damages, despite the fact that the state constitution denied such power to the trial court.[80] Subsequent to the decision in the *Avance* case footnoted, the Appellate Court of Illinois, Fourth District, reversed itself on the question, and in obedience to the *Neese* case[81] refused to weigh the evidence or review the exercise of discretion by the trial court in handling the issue of excessiveness, since it simply had no criterion for doing so under the *Neese* decision.[82] Even later, the same Court reversed itself again, under the erroneous conception that denial of certiorari in *Deen*[83] operated as an express affirmance by the United States Supreme Court of the state court power to pass on the question of excessiveness of verdicts.[84]

It is not believed that this Court would permit Federal rights vouchsafed by the F. E. L. A. to be destroyed under the name of local practice. As well said in the *Brown*[85]

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80. *Hust* v. *Moore-McCormack Co.*, 180 Ore. 409, 177 P.2d 429.

81. *Neese* v. *Southern R. Co.*, 350 U.S. 77, 100 L. Ed. 60, 61.

82. *Pennell* v. *Baltimore & O. R. Co.*, 13 Ill. App. 2d 433, 142 N.E.2d 497, 501, as quoted in the dissenting opinion in *Gulf C. & S. F. R. Co.* v. *Deen*, 317 S.W.2d 913, 916; *Coleman* v. *Gulf M. & O. R. Co.*, (App. Ct. Ill., 4th Dist.) 149 N.E.2d 656, 659.

83. 359 U.S. 945, 3 L. Ed. 2d 678, *supra* 25.

84. *Smith* v. *Ill. Cen. R. Co.*, App. Ct. of Ill., 4th Dist., 172 N.E.2d 303, 304.

85. *Brown* v. *Western Ry. of Alabama*, 338 U.S. 294, 299, 94 L. Ed. 100, 104; and see *Dice* v. *Akron C. & Y. R. Co.*, 342 U.S. 359, 369-370, 96 L. Ed. 398, 407; *Arnold* v. *Panhandle & S. F. R. Co.*, 353 U.S. 360, 1 L. Ed. 2d 889.

case, should this Court fail to protect Federal rights because of over-exacting local requirements, "desirable uniformity in adjudication of Federally created rights could not be achieved. The annotation found in 79 A.L.R. 2d at page 568 emphasizes the chaotic condition that will exist if it does not now exist, should the measure of the excessiveness of damages be considered a matter of local practice under the F. E. L. A. For example, it pronounces the Illinois rule to be that set forth in *Avance* v. *Thompson*, (*supra*, 31), which at the time had been overruled by *Pennell* v. *Baltimore & O. R. Co.*, (*supra*, 32), and makes no mention of *Deen* (*supra*, 25 and 32) or *Hust* (*supra*, 32). The supplement to the annotation[86] does pick up the *Smith* case (*supra*, 32), but both fail to make any mention of the Texas rule pronounced in *Kimbrell* (*supra*, 26). The only decision of the United States Supreme Court cited in support of the annotation sustains our position, in that it was there recognized that had the action of the state court in sustaining a verdict as not being excessive been "necessarily based upon an erroneous theory of Federal law," the same would have been reviewable by the U.S. Supreme Court.[87] That decision cited the *Bennett* case,[88] which held:

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86. Vol. 3, A.L.R. 2d Supplement Service, p. 1564

87. *Louisville & N. R. Co.* v. *Holloway*, 246 U.S. 525, 529, 62 L. Ed. 867, 870. As an example of the allowance of relief on a complaint of excessiveness of the verdict where an erroneous theory of Federal Law had been applied, the Court cited *C. & O. R. Co.* v. *Gainey*, 241 U.S. 494, 496, 60 L. Ed. 1124, 1125, which will be remembered as a case where it was successfully contended that the verdict was grossly excessive because the trial court failed to apply the proper Federal rule for the measurement of damages.

88. *Southern R. Co.—Carolina Division* v. *Bennett*, 233 U.S. 80, 87, 58 L. Ed. 860, 863.

"But a case of mere excess upon the evidence is a matter to be dealt with by the *trial court*."

The trial court had there deemed the verdict not to be excessive, just as the trial court did in the present case, and to our mind, our position finds support in the decision made. Contrary to the requirement of *Bennett*, the Court of Appeals in the case at bar has held that the question of excessiveness is not for the trial court, but for the Court of Civil Appeals on independent consideration, and later adjustment for clerical error.

It has been suggested that the states have gotten away with the "local practice" holdings because of the difficulty of securing review in this Court of a State Supreme Court decision ordering a new trial because of excessive damages.[89] The Mississippi *Smith* case[90] was cited as holding that a decision on excessiveness was not a final one of the state court, but it is believed that none of the cases cited in the Smith opinion dealt with a judgment where nothing else remained to be done following the filing of remittitur, and that the rule in *Atherton*[91] is the one that should be applied. The California Supreme Court opinion there required the party's consent to reduce damages because excessive, and this Court held:

"This consent has been given, as the record shows; and the judgment of the Court below is the judgment which the Supreme Court directed that court to enter and carry into execution. The litigation was ended by the decision of the Supreme Court. No discretion

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89. 17 *Ohio State Law Journal*, "Damages Under F.E.L.A.," pp. 474-475.

90. 295 U.S. 718, 79 L. Ed. 1673. *Mississippi Central R. Co. v. Smith*.

91. *Atherton et al. v. Fowler et al.*, 91 U.S. 143.

was left in the Court below if the required consent was given."

So it is in the present case

The Question of Expediency

"In all but three of the 50 states, either the highest court in the state or an intermediate appellate court, has some power to review the size of a verdict for excessiveness."[92]

So, we have not 57 but 47 varieties of appellate review, and it is fair to assume that in some of the jurisdictions, there might not be 11 wild cards, as in Texas (*supra* 13), but at least more than one intermediate appellate court. It would seem desirable for this Court to review the questions raised by petitioner and pronounce a uniform rule for the consideration of damages claimed to be excessive on appeal. It is believed that until the conflicts have been resolved the astute practitioner will owe it to his client in every F.E.L.A. case where a state court has ordered a remittitur to seek relief by application for writ of certiorari in this Court. In such situation, it would seem not only just but expedient for a standard to be erected that would be uniform in both Federal and state courts.

PRAYER

WHEREFORE, petitioner prays that a writ of certiorari be granted in order for this Court to review the record, opinion and final judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District at Beaumont, Texas, as rendered in this case, and on final hearing, the case be remanded to such court with directions to render

92. *Dagnello* v. *Long Island R. Co.*, 289 F 2d 797, 799

judgment affirming the judgment of the trial court, with all costs taxed against respondent, and petitioner prays for such other and further relief, general and special, at law and in equity, to which he may be justly entitled.

Respectfully submitted,

JONES, BRIAN & JONES,
P. O. Box 347,
Marshall, Texas,
BALDWIN & BALDWIN,
Mahon Building,
Marshall, Texas.

By: .....
Attorneys for Petitioner.

Of Counsel:

FRANKLIN JONES,
P. O. Box 347,
Marshall, Texas.

Date: .....

I certify that a copy of the foregoing Petition for Writ of Certiorari to The Supreme Court of Texas has been mailed on the day of , 1962, to the respondent's attorneys as follows: To Messrs. Orgain, Bell & Tucker, First Federal Savings Building, Box 1715, Beaumont, Texas.

.....
FRANKLIN JONES.

IN THE DISTRICT COURT OF JEFFERSON COUNTY, TEXAS.

No. B-76068

HOMER R. SIMMONS,

VS.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY.

Final Judgment

On the 9th day of January, 1961, the same being a day of the regular term of this Court, came on to be heard the above styled and numbered cause, and the parties appearing in person and through their attorneys respectively announced ready for trial;

Whereupon came a jury of twelve good and lawful men and women, towit: Phil W. Handley and eleven others, and after their due empanelment, they heard the pleadings, evidence, charge of the Court and argument of counsel, and on January 17, 1961, following presentation of the cause to them in charge by the Court, returned their verdict into open Court, which consisted of answers to special issues that resolved all issues of liability in favor of the plaintiff and against the defendant, and fixed the damages of the plaintiff at $139,615.00, which verdict was by the Court received and ordered filed.

And it having been made known to the Court that through agreement of the parties through counsel, the amount of $4,900.00 should be credited on said award of the jury in favor of the defendant, by reason of advance-

ments the defendant has heretofore made the plaintiff, and further, that the verdict of the jury embraced an award for time lost exceeding forty months of service from date of verdict;

It is therefore ordered, adjudged and decreed that the plaintiff, Homer R. Simmons, do have and recover of and from the defendant The Kansas City Southern Railway Company the sum of, towit: One hundred thirty-four thousand seven hundred and fifteen ($134,715.00) dollars, being the amount of said verdict of $139,615.00 less the credit due the defendant of $4,900.00, together with interest thereon from the date of judgment until paid at the rate of six (6%) percent per annum, and all costs of this suit, for all of which let execution issue.

To which action, the defendant duly excepted in open court.

s/ Gordon Gary,
Judge Presiding.

No. 6490

KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLANT,

VS.

HOMER R. SIMMONS, APPELLEE.

This is a suit for personal injuries brought by Homer R. Simmons against the Kansas City Southern Railway Company, under the Federal Employers Liability Act. Judgment was rendered for appellee Simmons in the amount of $139,615.00 based upon jury findings that appellant Railway Company was guilty of negligence and appellee was not contributorily negligent. The jury found appellant negligent in the following respects: (1) In fail-

ing to furnish a safe place to work. (2) In failing to provide sufficient help to plaintiff in removing the gate from under the train. (3) In dropping a portion of the gate without warning

Appellant contends there was no evidence to support the submission of Special Issue No. 2, relating to the failure to supply appellee sufficient help to remove the gate from the train. This is a question of law and is to be tested on appeal by considering only the evidence favorable to verdict and disregarding all other evidence. This incident occurred when appellee attempted to raise the end of a gate post which had become lodged beneath the train. Through a request for admission, it was proved that appellant's operating Rule No. 107 provided that all persons employed on a train must obey the instructions given by the conductor. The evidence also showed that if additional help was needed to dislodge the gate, the sole right and duty to provide that help was on the conductor. The conductor told appellee that if they could raise the gate they could slip it out from under the train. When appellee attempted to raise one end of the gate he sustained an injury to his back. The conductor testified he had tried to move the gate himself but could not move it before the attempt was made by appellee. It is clear in this state, the law imposes upon the employer the duty to exercise reasonable care in providing for an employee adequate help in the performance of work required of him. The duty is nondelegable and continuous, the rule being in principle the same as that requiring the employer to furnish his employee with safe instrumentalities and a safe place to work. *Western Union Telegraph Co. v. Coker*, 146 Tex. 190, 204 S.W.2d 977. The jury undoubtedly concluded the conductor, as a reasonable prudent person, should not have asked appellee to lift the gate without furnishing additional

help to accomplish this task. The submission of this issue was supported by the evidence.

Appellant also contends there was insufficient evidence to support the submission of Special Issue No. 2, discussed in the preceding paragraph. This court has considered all of the evidence in this record, both favorable and unfavorable to the finding of the jury, and hold the point is without merit.

In other points appellant complains of a definition given in connection with Special Issue No. 1, and of the lack of evidence and insufficiency of the evidence to support the submission of Special Issues Nos. 1, 1-A, and 3-B. If there was any error in the submission of this definition and these issues it was harmless error because the findings of the jury in answer to Special Issues Nos. 2 and 2-A were sufficient to support the judgment. *T. & N. O. Ry. Co.* v. *McGinnis*, 130 Tex. 338, 109 S.W.2d 160.

Appellant complains of the size of the verdict in the amount of $139,615.00, contending it is grossly excessive. The San Antonio Court of Civil Appeals, in an opinion by Justice Norvell, clearly sets forth the duty of the appellate court in its examination of this question in *Kimbriel Produce Co.* v. *Webster*, 185 S.W.2d 198, as follows:

"The record of the evidence here undoubtedly supports the award of a large sum of money or damages. The determination of the amount rests primarily with the jury, and there is no set formula applicable to cases of this character whereby the exact amount can be measured or ascertained. The amount of the award is not, however, free from control or revision by either the trial court or this court. The doctrine is now generally accepted that the verdict of the jury is subject to the supervision of the court whether such verdict is too large or too small. Prec-

edents are helpful and of some value in determining whether damages awarded for similar personal injuries are or are not excessive or inadequate, although it is conceded that no two injuries are alike in all particulars and do not have the same consequence or results insofar as damages are concerned. It is recognized that there should be reasonable uniformity as to the amount of verdicts and judgments in the various cases."

Appellee was 46 years of age at the time of injury, and 48 years old at the time of trial, with a life expectancy of 22.88 years. He engaged in work at cleaning and pressing, farming and in the oil field before his employment in 1942 with appellant. Appellee is a high school graduate with one semester of college work. In 1958, his last full year of work he earned a little over $7,000.00. On the date of the incident, he received two injuries to his back, one while trying to lift the gate and the other when the gate was suddenly dropped. His back has pained him almost continually since that time. He began to receive medical treatment consisting of heat treatment, bed rest and traction. Later he was given a brace to wear. His back continued to hurt and some two months after the injury he underwent a major surgery to remove a disc. He remained in the hospital about 22 days and went home to bed for an additional two weeks. There was no pain for two weeks following the operation, but then it returned and still existed at the time of trial. His testimony showed he worked for 9 days in a liquor store but quit because he could not move cases of liquor and beer. He testified he could not sit too long in one spot and could not stand on his feet too long. He tried hunting several times but could not walk long. He had not seen a doctor for about 5 months before the trial.

Dr. Heinz Faludi was the only doctor to testify. His testimony was given by deposition, the direct portions offered by appellee and the cross-examination by appellant. Dr. Faludi testified as to the history of appellee, including the operation removing the ruptured disc, which was performed by another doctor. He found the scar left by the incision, and tenderness over the lumbo-sacral region; weakness and atrophy in the right calf; lumbar lordosis reduced; motion of lumbar spine restricted; tenderness on the lumbo-sacral joint; tenderness over the right medium gluteal muscle; and radiculitis involving the S5 and L1 nerve root on the right. He recommended to appellee conservative treatment and if no rel ef, then a re-exploration operation to free the patient of the scar formation and possibly a posterior rhizotomy, which is cutting the pain fibers of the nerves, if the root was irreparably damaged. Later, he gave appellee a myelogram, which was his second, and found a questionable defect at L4 which he said was more likely old scar formation than new herniation. He stated: "I can't make any definite promise as to the success of the re-operation." He was asked if appellee was able to engage in work which required sustained heavy lifting, or stooping and bending, that sort of th ng, heavy manual labor, to which he answered: "I do not believe so, not in the condition he is in now." He testified: "I think an operation would stand a chance, probably better than an even chance to offer him some relief." "I think the pain is fa rly well localized and I think it would stand a fairly good chance of success." He was asked the question, "In other words, you may give him enough relief so he can engage in a remunerative employment, assuming that within reasonable probability that your operation is successful?" He answered, "Yes, sir." Also he testified: "Well, I think we would stand a reasonably good chance that the man could be improved and could be freed of some of his pain,

but I am not quite sure that he will definitely be able to go to heavy manual labor. I think he should be able to do moderate labor fairly well." Also: "I would feel he is stationary and with conservative treatment I very much doubt that he will substantially change." Also: "I believe he would not be in the good risk group any more. I think he would be probably somewhat in the poor risk group." At the time of trial appellee had declined a second operation.

This court will apply the rule set forth in *Wilson* v. *Freeman*, 108 Tex. 121, 185 S.W. 993: "All the Court of Civil Appeals can do, and all that is required of it to do * * * is to exercise its sound judicial judgment and discretion in the ascertainment of what amount would be reasonable compensation for the injury sustained, and treat the balance as excess * * * (Having) decided upon an amount that would be reasonable compensation * * * it should authorize a remittitur of the excess * * * in accordance with its sound judgment." The Supreme Court cited this rule in the case of *Flanigan* v. *Carswell*, 159 Tex. 698, 324 S.W.2d 835.

It is unnecessary for us to cite the multitude of cases which involve the amount of damages awarded for injuries more or less similar to those sustained by appellee here. They will be found collated in *Houston Belt & Terminal Ry. Co.* v. *Burmester*, 309 S.W.2d 271 and 17 Tex. Jur. 2d, Sec. 350 at p. 425.

After a careful consideration of the evidence and these authorities along with all others cited by appellee on this question, we have come to the conclusion that the verdict of the jury is excessive to the extent of $40,000.00. We regard the record as presenting a case of considerable past and probable future physical pain and mental suffering. We also have taken into consideration the deceased value

of the dollar at this time. We do not consider appellee as having been totally disabled as in the case, *City of Fort Worth* v. *Barlow*, 313 S.W.2d 906, in which the plaintiff was permanently paralyzed from the shoulder down, nor the case of *T. & N. O. Ry. Co.* v. *Flowers*, 336 S.W.2d 907, in which plaintiff sustained injuries requiring amputation of both legs and one arm. Upon the record, it is our duty to suggest a remittitur in accordance with Rule 440, Texas Rules of Civil Procedure.

If appellee will file in this court, within two weeks from the date of this judgment, a remittitur of $40,000.00, the judgment will be reformed and affirmed for the sum of $99,615.00; otherwise the judgment will be reversed and the cause remanded.

The judgment is affirmed conditionally.

s/ Homer E. Stephenson,
Associate Justice.

IN THE COURT OF CIVIL APPEALS, NINTH SUPREME JUDICIAL DISTRICT, BEAUMONT, TEXAS

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Appellant,
vs.
HOMER R. SIMMONS,
Appellee.
No. 6490.

Remittitur by Appellee, Subject to the Overruling of His Motion for Rehearing

Subject to the action of this honorable court on the motion for rehearing filed by appellee herein, tendered herewith, and subject to further right of appellate review, and in obedience to the decision and order of this honorable

court under date of October 26, 1961, the appellee hereby files this, his remittitur of Forty Thousand and No/100 Dollars ($40,000.00), hereby releasing such amount of the judgment heretofore entered in his behalf in this cause, and requests that the remainder of the judgment be affirmed, in the event that his motion for rehearing be denied, as indicated by said decision and order of this honorable court.

This, the 1st Day of November, 1961.

s Homer R. Simmons,
Appellee.

THE STATE OF TEXAS
COUNTY OF HARRISON

Before Me, the undersigned authority, in and for said county and state, on this day personally appeared HOMER R. SIMMONS, well known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office, this the 1st day of November, 1961.

s Nell Rose Worley,
(Seal) Notary Public in and for Harrison County, Texas.

No. 6490

IN THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT BEAUMONT

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Appellant,

vs.

HOMER R. SIMMONS,
Appellee.

Motion for Rehearing on Behalf of Appellee

Comes now appellee and files this motion for rehearing and shows:

POINT OF ERROR ONE.

Error of the Court of Civil Appeals in requiring a remittitur in this case, for the reason that the effect of the same is to deprive appellee Simmons of the right of trial by jury, guaranteed in the Seventh Amendment to the Constitution of the United States.

POINT OF ERROR TWO.

The question of damages under the Federal Employers' Liability Act is one of Federal substantive law; consequently, a state court may not diminish or alter that right; and the Court of Civil Appeals erred in holding otherwise by requiring a remittitur in this case, as a condition of affirmance.

POINT OF ERROR THREE.

Under the Federal Employers' Liability Act, the finder of facts is exclusively vested with the prerogative of assessing reasonable compensation for damages; and the action

of the Court of Civil Appeals in substituting its judgment for that of the jury deprived Homer R. Simmons of his right of trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States.

POINT OF ERROR FOUR.

The test for measuring a jury verdict under the Federal Employers' Liability Act is whether the verdict is monstrous, and the Court of Civil Appeals erred in applying the test of "reasonable compensation," or any other standard than monstrosity.

POINT OF ERROR FIVE.

The test for measuring a jury verdict under the Federal Employers' Liability Act is whether the verdict of the jury is so excessive as that reasonable minds could not differ in the conclusion that it is too high, and that every doubt must be resolved in favor of the action of the trial court in sustaining the verdict, all of which matters present a question of law and not fact, so the Court of Civil Appeals erred in applying the factual test indicated in its opinion.

POINT OF ERROR SIX.

Even if the Court of Civil Appeals is authorized to substitute its views for that of the jury in a Federal Employers' Liability Act case, and apply the Texas test of excessiveness to it under Rule 440, Texas Rules of Civil Procedure, the Court of Civil Appeals erred in applying any supposed test of "reasonable compensation," the correct test being whether, from the record, the jury verdict is the result of passion, prejudice, or other improper motive in the assessment of damages.

POINT OF ERROR SEVEN.

The ascertainment and assessment of damages being an integral part of the right vouchsafed by Congress under the Federal Employers' Liability Act, Federal law applies to such ascertainment and assessment, and the Court of Civil Appeals erred in holding otherwise.

POINT OF ERROR EIGHT.

Under the Federal Employers' Liability Act, the test of excessiveness is whether there had been an abuse of discretion on the part of the trial judge in overruling the motion for new trial without requiring a remittitur; and the Court of Civil Appeals erred in holding otherwise.

POINT OF ERROR NINE.

The failure of the Court of Civil Appeals to hold or find that the trial judge abused his discretion in overruling the motion for new trial without requiring remittitur deprived the Court of Civil Appeals of the power to order reversal or remittitur.

POINT OF ERROR TEN.

Because there is in the record herein, a basis for mathematical computation of an amount in excess of the jury award, under the rule that every doubt must be given to the judgment of the court below, and because reasonable men could accordingly differ whether the verdict here is

excessive, the Court of Civil Appeals erred in requiring remittitur.

Respectfully submitted,

Jones, Brian & Jones,
P. O. Box 347,
Marshall, Texas,

By:
Attorneys for Appellee.

Judgment Rendered October 26, 1961.

The Kansas City Southern Railway Company,

No. 6490 vs.

Homer R. Simmons.

Appealed from the District Court of Jefferson County.

Opinion by Associate Justice Homer E. Stephenson.

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of the court filed October 26, 1961, that there was excessive damages allowed in the judgment, it is therefore considered, adjudged and ordered that if appellee, Homer R. Simmons, files a remittitur in the amount of $40,000.00 within two weeks to reduce the amount of the judgment to $99,613.00, (sic) and the appellee, Homer R. Simmons, filed his remittitur in the above stated amount, it is the judgment of this court that appellee, Homer R. Simmons, recover of the appellant, The Kansas City Southern Railway Company, the remainder of the trial court's judgment being the sum of $99,615.00, and as modified, the judgment below is affirmed with all costs adjudged against the appellant, The Kansas City Southern Railway Company,

and the surety on its appeal bond, Central Surety and Insurance Corporation; and this decision be certified below for observance.

IN THE SUPREME COURT OF TEXAS.

January 31, 1962

No. A-8769.

From Jefferson County,
Ninth District.

Homer R. Simmons

vs.

The Kansas City Southern Railway Company.

Application of petitioner for writ of error to the Court of Civil Appeals for the Ninth Supreme Judicial District having been duly considered by the Court, and the Court having determined that same presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused. It is further ordered that the applicant, Homer R. Simmons, pay all costs incurred on this application.

No. 6490

IN THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS AT BEAUMONT

KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

HOMER R. SIMMONS, APPELLEE.

Motion to Correct Judgment

Comes Now Appellant, and under the provisions of Rules 316 and 317 of the Rules of Civil Procedure, files this its motion requesting this honorable court to correct the judgment heretofore entered by said court in the above styled and numbered cause, and as grounds therefor, would show unto the court the following:

1.

Appellant would show unto the court that the jury in this cause originally returned a verdict in the sum of $139,615.00. That at the time the judgment was entered in the trial court, it was stipulated and understood between the parties and reflected in the judgment that the defendant was entitled to a credit of $4,900.00 and that the final judgment entered in said cause by the trial court included this item and gave credit for such amount heretofore paid by the defendant in the form of advancements and that the judgment in said cause was finally entered directing that the plaintiff recover of and from the defendant the sum of $134,715.00.

2.

Appellant would further show unto the court that in its opinion, the Court of Civil Appeals directed a remittitur in the sum of $40,000.00, and that subsequently, this honorable court, did enter a judgment to that effect but that at the time said judgment was entered, the court based its calculations on a judgment in the sum of $139,615.00, rather than the amount of the judgment which was actually entered by the trial court, to-wit: $134,715.00.

3.

Appellant would therefore show unto the court, that a mathematical error has occurred, and that the amount of the judgment, after the remittitur, should be the sum of $94,715.00, rather than the sum of $99,615.00 as reflected by the records of this court.

4.

Appellant therefore respectfully requests that this honorable court make such correction as are indicated and for such other relief as it may show itself entitled to receive.

Respectfully submitted,

Orgain, Bell & Tucker,
First Federal Savings Building,
Beaumont, Texas.

(Filed January 26, 1962.)

By Cleve Bachman,
Attorney for Appellant.

A copy of this motion has been mailed by Certified Mail, to counsel for Appellee, by posting a copy of same in the United States Mails, on this the ..... day of January, 1962.

Cleve Bachman.

No. 6490

KANSAS CITY SOUTHERN RAILWAY COMPANY.
APPELLANT.

vs.

HOMER R. SIMMONS.
APPELLEE.

The opinion in this case required a remittitur of $40,000.00, holding the jury verdict was excessive by that amount. Such opinion erroneously stated the judgment for appellee was $139,615.00, while in fact the judgment was $134,715.00. A credit of $4,900.00 had been given to appellant in the trial court for money advanced to appellee. Because of this clerical error the opinion set the amount to be $99,615.00, while such judgment should have been $94,715.00. The original opinion is hereby amended to show the affirmed judgment to be in the amount of $94,715.00.

/s/ Homer E. Stephenson,
Associate Justice.

(Filed March 29, 1962.)

T. R. C. P. 328.

New trials may be granted when the damages are manifestly too small or too large, provided that whenever the court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal in said action, then the party remitting shall not be barred from contending in the appellate court that said remittitur should not have been required either in whole or in part, and if the appellate court sustains such contention it shall render such judgment as the trial court should have rendered without respect to said remittitur.

T. R. C. P. 439.

If, in any judgment rendered in the district or county court, there shall be an excess of damages allowed, and before the plaintiff has entered a release of same in such court, in the manner provided by these rules, such judgment shall be removed to the Court of Civil Appeals, it shall be lawful for the party in whose favor such excess of damages has been rendered to make such remittitur in the Court of Civil Appeals in the same manner as such release is required to be made in the district or county court. Upon such release being filed in said court, after revising said judgment, said Court of Civil Appeals shall proceed to give such judgment as the court below ought to have given if the release had been filed therein.

T. R. C. P. 440.

In civil cases appealed to a Court of Civil Appeals, if such court is of the opinion that the verdict and judgment of the trial court is excessive and that said cause should be reversed for that reason only, then said appellate court shall indicate to such party, or his attorney, within what time he may file a remittitur of such excess. If such remittitur is so filed, then the court shall reform and affirm such judgment in accordance therewith; if not filed as indicated then the judgment shall be reversed.

Article 1738, V. A. C. S.

The Supreme Court shall, as early as practicable after the 1st day of January and the 1st day of June of each year, equalize(d), as nearly as practicable, the amount of business upon the dockets of the several Courts of Civil Appeals as of the close of business on the 31st day of December and the 31st day of May of each year by directing the transfer of cases from such of said Courts as may

have the greater amount of business upon their dockets to those having a less amount of business. Said Court may, at any other time, order cases transferred from one Court of Civil Appeals to another, when, in the opinion of the Supreme Court, there is good cause for such transfer. * * *

Office-Supreme Court, U.S.
FILED
APR 19 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 565

HOMER R. SIMMONS,
Petitioner,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Respondent.

SEPARATE APPENDIX TENDERED IN CONNECTION WITH PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT BEAUMONT, TEXAS

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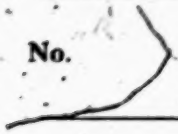
E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 

HOMER R. SIMMONS,
Petitioner,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Respondent.

SEPARATE APPENDIX TENDERED IN CONNECTION WITH PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT BEAUMONT, TEXAS

The petitioner, *Homer Ray Simmons*, testified:

He was born November 22, 1912, and attained a high school education and one semester of college. His occupation experience consisted of employment in a dry cleaning and pressing shop, oil field work, farming, and railroad work, all of which required physical activity such as stand-

ing, walking, occasionally lifting heavy weights, and things of that character. His railroad experience began in April, 1942, when he hired out as a fireman with the respondent, receiving $6.95 a day as wages. The highest rate of pay given in those days was approximately $8.07 per hundred miles, but a fireman on a switch engine in 1959 received pay at the rate of $21.90 a day, and the job on which petitioner was firing when injured paid $17.22 for 100 miles. The last full year that the petitioner worked was 1958, and during which he earned a little over $7,000.00. In 1957, he earned about $7,400.00, and in 1956, $7,200.00 or $7,300.00.

The petitioner was promoted to locomotive engineer in 1953, and was qualified to work as such whenever a job opened, and indeed, had served as an engineer for short periods of time during 1956, 1957 and 1958. The respondent had in effect a seniority system under which the petitioner qualified both as a fireman and engineer, and the man next below the petitioner on the seniority list had worked in the capacity of a locomotive engineer ever since the date of petitioner's injuries, May 10, 1959. The wages of an engineer would be about $9,000.00 a year or maybe a little more, and a road fireman's salary would run between $7,500.00 and $8,600.00 a year (S. F. 70).

On May 10, 1959, as the train on which petitioner was working negotiated a crossing with the track of another carrier, a wooden crossing gate blew into the side of the train so as to lodge between the truck housing and the car body of the second baggage coach. In assisting to dislodge the gate and carry the broken portion thereof across another track of the respondent, so as to throw it on the right of way, petitioner injured his back when straining on the gate and again when those helping to throw it to the side of the right of way dropped their end of the load without warning, so as to give the petitioner an awfully severe jerk as

the entire weight of the load of 300 to 350 lbs. was thrown upon him. This occasioned "an awful pain" in the small part of petitioner's back, but he returned to the engine and completed his run, although enduring pain and nausea most of the day.

Despite the continuing pain, after spending the night at the end of his run at Port Arthur, the petitioner returned to his home at Shreveport the next day, by which time he was enduring a sharp pain in the small of his back and his right leg had begun to feel numb. He was unsuccessful in his efforts to see any of the doctors on the hospital association staff of The Kansas City Southern Hospital Employees Hospital Association before the following Thursday, but did see them on Thursday, following which he was hospitalized, and given heat treatments through Friday and Saturday. On the next Monday, he was put in traction at another hospital and remained in it for a week. He was never completely free of pain, which continued in his back, along with the sensation of the right leg and foot being asleep at all times. He was sent home thereafter by Dr. Rushing of the hospital staff, who was in charge of the case.

By the time he left the hospital, the pain had increased to where he could hardly stand it in his back, and when he was gotten home, he was put in bed and treated by his wife with rubbing, heat and liniment. Later, he was referred to Dr. Boykin and placed in a sanitarium for additional continuous traction treatment, interrupted by physiotherapy over a period of 12 days. He had received no relief from his back pain, and the leg had likewise continued to have the sensation of being asleep. The petitioner was then referred to Dr. Oxford, upon recommendation of a claim agent for the respondent. Following an x-ray examination, this doctor advised petitioner that he had a ruptured disc in his back that needed to come out. The pe-

titioner protested he did not want to be operated on unless it was absolutely necessary, and the doctor did make effort to treat him with a brace which petitioner still wears continuously, and which consisted of a metal and leather harnessing device extending from a point 8 or 10 inches below the belt line to 4 or 5 inches above the belt line. The brace extended around the entire body, and petitioner was advised by the doctor to wear it when he was up on his feet.

After wearing the brace 10 days, in response to the doctor's inquiry, petitioner advised he could not see that it had helped him and again in response to the doctor's inquiry, stated that he had made up his mind that he had suffered enough to get his back corrected, and he would take the operation. The decision to perform the operation was made July 13, 1959, little better than two months after petitioner's injury, and over which entire period of time he had not gotten relief completely from his suffering, particularly in his back, where most of the pain was, and right on down the back of his leg.

A myelogram x-ray examination was made of petitioner, in which an opaque fluid was injected into the spinal canal, and the x-ray studies made.

Petitioner was in the hospital 22 to 23 days following the operation performed on his back, the first 14 of which he was not permitted out of bed. His pain was alleviated for a short period following the operation, but on the 14th or 15th day, when he was gotten out of bed with the assistance of two porters to seek to exercise his legs, the pain returned. Following his stay in the hospital, petitioner was confined to his bed at home about two weeks, and with assistance, gradually began to walk again while wearing the brace as ordered by the doctor. He saw Dr. Oxford some four or five times after the operation, which was as

long as he evidenced a desire to treat him or do something for him.

After the operation, the petitioner could not tell that he was improving at all, and the pain remained in his back after its return, as did the numbness in his leg. He next went to New Orleans and was seen by Dr. Kirgis at Oshner's Clinic. Thereafter, the petitioner inquired of several doctors as to their advice and opinion of Dr. Faludi as a neurosurgeon, and upon being told he was as good a doctor as he could find, the petitioner consulted him. Thereafter, at the request of the respondent, he went to see a Dr. Gosley at the Highland Sanitarium in Shreveport. Under none of the medical men seen by him had the petitioner found any improvement in his condition and the pain had continued ever since the short period of relief following the operation wore off.

After his operation, the petitioner inquired of Dr. Faludi if he thought it would harm him to try and work in a package liquor store owned by one of his friends, that petitioner needed something to do, and the doctor advised him that if he would not pick up anything heavy, he thought it would be all right. After 9 days on this job, the inability of the petitioner to move cases of liquor and beer, because he couldn't stoop over to pick them up, forced him to leave the job.

Even assuming that the petitioner could find a job doing clerical work, his situation is such as that he has to be where he can move around, being unable to sit too long in one place, and experiencing pain if he stands on his feet very long at a time, all of which caused him to just sit down and walk at different intervals. He had no strength in his back to lift any weights of any appreciable amount, and in working as a fireman, even on a diesel engine, there

would be climbing to be done, the bottom of the cab doorway being some 8 feet above the ground and reached by climbing a ladder. Furthermore, the work on the diesel locomotive would require a fireman to make five or six trips through the locomotive and check to see if everything was working all right, and to make such minor repairs as could be done on the road. The seat of the fireman on the locomotive is right over the trucks of the engine, so that in going across rail joints or low places in the tracks, the fireman gets a constant pounding, different to the experience one would have in riding on a passenger car.

Even the experience of riding from Shreveport to the place of trial in Beaumont on the Sunday before had caused the petitioner not to rest any that night, since his back hurt all night long.

Aside from his occupation, the petitioner trained bird dogs and engaged in extensive hunting and fishing trips, which activities he had been forced to abandon, as well as give up his lodge work with the Firemen's Lodge and the Masonic Lodge since attending meetings required him to climb steps which he could not do. Neither has he been able to attend to his yard work which he did before his injuries.

On cross-examination, the petitioner testified that he had never refused an operation at the hands of Dr. Faludi, but did tell him on the last occasion he went to him that he did not want to be operated on any more.

On redirect examination, the petitioner testified as to additional duties required of a fireman, such as assisting the brakeman to use a chain and knuckles carried on the locomotive for that purpose in cases where a draw bar has been pulled, and which work required heavy lifting. Likewise, he gave testimony of one occasion having to use a big

fire extinguisher weighing 100 lbs. to keep grease out of the diesel engines or to keep it from catching fire when they had a hot journal.

The witness *Glenn Hawthorne*, a locomotive fireman for The Kansas City Southern Railway Company, testified he had known the petitioner about 19 years, and that before his injury, he performed his work as well as anyone, but that since his injuries, he has noticed a considerable change in him, in that he didn't seem to be able to get comfortable in any position, and he was continually trying to shift around to a comfortable position; that he had seen him when the petitioner did not know he was being observed, and while he was trying to feed his dogs and experiencing considerable difficulty in trying to get up from a squatting position. The witness had seen the petitioner getting in and out of automobiles and observed that he had considerable difficulty in doing this, as well as in walking up and climbing down steps, even to the extent of moving up sideways and catching on for support in negotiating three steps on the front porch of the witness.

The witness *W. G. Christian*, an employee of The Kansas City Southern Railway Company as a fireman and engineer, testified that he had known the petitioner 18 or 19 years, worked on jobs with him, and that prior to his injuries, he appeared to have no physical limitations that prevented him from doing his work, and that his ability to work was good. Prior to the injuries of petitioner, the witness had hunted and fished with him on frequent occasions, observed him training his dogs, and caring for them. Further, as a member of the same fraternal organizations to which petitioner belonged, he had observed him as a regular attendant before his injuries, and had noticed no difficulty in his movements up some 16 steps to the place of meetings before his injuries.

On seeing the petitioner since his injuries, the witness described his movements as all being very slow, and each step that he took being very cautious and careful. He appeared to have a drag on one side. Particularly did he notice the difficulties of petitioner on a fishing trip when he indicated he had stood all that he could after about an hour or so, and although he had never brought him home from fishing after only an hour before he was hurt, on this occasion he did so, and found he had to catch hold of his hands and help him out of the boat. On the first occasion petitioner attempted to attend a lodge meeting following his injuries, after he came down the steps for refreshments, he had to return home because he was not able to go back up. Following this, the petitioner declined an offer to go to the lodge with the witness again, saying he wouldn't attempt to climb the stairs. Although before the injuries of the petitioner, the witness had been hunting with him on occasions when he'd stay out all day, since his injuries, he would stay out 30 to 45 minutes and have to come in and rest.

The witness *Harry Hatch* was an employee of The Kansas City Southern Railway Company as a fireman and had known the petitioner approximately 17 years. He testified that had petitioner been working during the past year, he would have been assigned for a good portion of the time as an engineer, and that the position for a regular job as fireman or engineer would have been open over this period of time. Before his injuries, petitioner appeared to be sound, in good health and very active, having quite an interest in fishing, which he would pursue over several hours at a time, during which he would give the appearance of being active and physically able. Since the injuries of the petitioner, the witness has noticed limitation in his movements, in that his carriage seems to be impaired, so that he doesn't hold himself as erect as he did before being hurt.

He has observed him with his shoes unlaced, which he had never noticed before in the petitioner, whom he had known to be a very meticulous dresser. On watching petitioner in his back yard when he was going to pet his bird dogs, the witness would observe it was difficult for him, and that he didn't have the freedom of movement he previously had; that he had to stoop a little bit to pet the dogs on the head.

On seeing the petitioner try to get up and down steps, the witness found his movements noticeable, and to be something that just stands out in that they would be comparable to a man who had a stiff leg; that petitioner would put one foot on a step and pull the other one up to it, and put the same foot up on the next step and bring the other one up beside it.

On making an automobile trip with the petitioner to Leesville, Louisiana, the witness noticed that he couldn't get in a comfortable position and that it was necessary for them to stop numerous times for petitioner to get out on the way down and back.

On cross-examination, this witness testified that oftentimes it became necessary for a fireman on a diesel locomotive to do heavy lifting and straining, as exemplified by the necessity to chain up cars, or put a frog on the track. That in the course of such work the general habit is for everyone to pitch in and help, including the fireman and engineer; that the fireman's duties definitely required lifting, since all of the equipment was on the engine, such as knuckles, chains for towing and things.

The witness *Harry Middleton*, a switchman for The Texas & Pacific Railway Company in Shreveport, testified that he had known the petitioner 20 to 25 years, having had a chance to observe his manner of doing his work when the witness worked with him on The Kansas City Southern

Railway Company. On these occasions before the injuries of the petitioner, he seemed to well and actively discharge his work and engaged in other activities, such as hunting, fishing and work about his home. When he first knew the petitioner, he lived across the street from him and observed him in taking care of his bird dogs and his home work quite a lot. Since his injuries, the petitioner had not been the same active man he was before, there being so much difference that it is difficult to describe. Before he was hurt, it was nothing for the petitioner to hunt practically all day, bird hunting, which is pretty hard, and since his injuries, an hour or two hours is an awful long time. As to his fishing activities, he has had to help the petitioner in and out of the boat, which the witness considered showed a lot how badly he was hurt. Prior to his injuries, the petitioner's movements were vigorous, but now they are "draggy and more or less stiff actions," to such extent as that he does not move normally, and when he gets out of a chair, he seems to be in a strain, whereas he never was before he was hurt.

Dr. Heinz K. Faludi testified by way of deposition. A resident of Shreveport, Louisiana, he testified as to having received an M. D. degree from Temple University in 1943; having a rotating internship at Philadelphia General Hospital for one year, and service in the United States Army from 1944 to 1946. While in the army, he took a course in military neuropsychiatry, and during most of his army duty, performed work in neuropsychiatry, ending up a Chief of Neuropsychiatry with the rank of Captain.

On leaving the army, he underwent postgraduate training in neurosurgery in New York, taking a total of five years postgraduate work, four of which were spent in neurological surgery and one in general surgery. The work was done at the V. A. Hospital in the Bronx, New York, in affiliation with the Neurological Institute in New York.

After his postgraduate work, he met the requirements of the American Board for Neurological Surgeons, and went into the practice of neurological surgery in Shreveport, Louisiana. He is a diplomat of the American Board of Neurological Surgery, serves as consultant in neurosurgery at the V. A. Hospital in Shreveport, and is Chief of the Department of Neurology and Neurosurgery of the Confederate Memorial Hospital in Shreveport.

He is also an associate professor of neurosurgery at Louisiana State University, Postgraduate Medical School, member of the American Medical Association, of the Louisiana State Medical Society, and of the Shreveport Medical Society, as well as of the Southern Medical Association. He is on the staff of neurosurgery of the Physicians & Surgeons Hospital, Doctors Hospital, Highland Sanitarium, Willis-Knighton Memorial Sanitarium, and T. E. Schumpert Memorial Sanitarium, all of Shreveport, Louisiana. After testifying that neurosurgery is a specialty of medicine which is concerned with the diagnosis and treatment of disease or injuries to the nervous system, which would include injuries to the head and brain, to the spine or the spinal cord and to the peripheral nerves, the doctor testified that he had occasion to see and treat Homer R. Simmons first on January 27, 1960. The patient was referred to him by Dr. E. W. Harris, Sr., because of persistent low back and leg complaints. The examination of Dr. Faludi developed that the pain was specifically located in the low back, and of a nature as described by the patient as if something were shoved up his back. The pain was described as radiating to the right posterior thigh, and in the sitting position, pain would be experienced in the posterior lateral calf on the right and over the lateral right foot. Complaint was made of pain in the left thigh occasionally, but usually not as severe as on the right. The patient had observed that the right foot tends to swell when moving around or when sitting in one po-

sition for a long time, which condition was described as a "puffed up" feeling in the right foot and the toes and the ball of the foot. Complaint was made by the patient of occasional pain in the left arm and in the back of the neck, and of both of his hands tending to fall asleep at times.

A description was given by the patient of his injuries of May 10, 1959, his actions following his injury, the consultation with Dr. Rushing, and treatments received from the various physicians who had seen him, all leading up to the operation of July 14, 1959, following the taking and interpretation of myelogram. Likewise, the postoperative condition of the patient was narrated by him to Dr. Faludi, as well as his past medical history of accidental injury in 1943, in the area of his right hip, followed by about six days' disability, and a right inguinal hernia operation in 1954, as well as treatment for peptic ulcers off and on for the past 18 years.

The actual neurological examination of the patient made by Dr. Faludi disclosed that the patient was a 46-year-old white male, appearing to be cooperative and pleasant during the examination. He was of the asthenic habitus, or skinny type, of somewhat slender type and appeared to be in acute distress. When he walked, it seemed that he walked with a severe limp and he tended to protect his right leg. Examination of the head and neck were negative, the lungs seemed to be normal, heart examination negative, blood pressure 110 80, which is normal. The examination of abdomen was essentially negative. On examination of the low back, Dr. Faludi found that the patient had an incisional scar in midline extending from about L3 to S1, which appeared to have well healed. There was still tenderness over the lumbosacral region of the incision. This region was described as where the lumbar spine and the sacrum join up, and where the greatest bend is in the low back

In a supine position, the patient would be on his back and lying flat on the examining table, and at which time he tended to keep his right leg flexed, which usually is an indication that it is painful when he stretches it. There was a slight weakness in the right calf musculature and there was some atrophy of the right calf or wasting away. Measurements disclosed 32 cm. in circumference for the right calf, and 34-1/2 cm. in circumference for the left calf, showing a difference of about one inch, which is significant. There was slight atrophy involving the medial gluteal musculature on the right. It appeared that the lumbar lordosis was reduced, which means the usual curvature of the low back that is usually a concavity presented an appearance of being somewhat reduced. Motions of the lumbar spine were severely restricted and were estimated to be about 30% of normal in flexion, 30% of normal in extension, and 30% of normal in right and left bending. There was tenderness over the lumbosacral joint, there was also tenderness over the right medium gluteal muscle. The supra patella reflex was hypoactive and symmetrical bilaterally, the patella reflex was active and symmetrical bilaterally, the Achilles and posterior tibial reflex were absent bilaterally. The doctor found a central diminution over the fifth lumbar and first sacral dermatone on the right, but it seemed to him that there was some psychological overlay involving neighbor dermatones as well.

The psychological overlay was explained by description of the examination for sensations over certain nerve areas in the body which are known to be supplied by certain nerves. When a patient states that he has a sensory diminution over such an area, and if it coincides with the anatomical distribution of such a nerve, then the doctors designate that this sensory diminution is over a certain nerve area. In the particular patient it was approximately over the area of the fifth lumbar and first sacral nerve root on the right

side, but the borderlines were not completely distinct, and it seemed to the doctor that the patient was a little generalizing in saying that it was a little higher and a little wider and so on, rather than that it was distinctly localized to this area. It was, however, sufficiently well localized that the doctor felt it may have had some significance.

The straight leg-raising test was performed and could be done to about 60° off the horizontal. It is performed by the patient being placed on his back, and asked to keep the leg straight, and the leg is then raised off the horizontal and the particular patient could raise it to about 60°. When raising the leg high, he complained of sciatic pain. Ordinarily, a patient can raise the leg up to 80° or 90° and should not have sciatic pain. This was considered a slightly positive La Segue test, which indicates some irritation to the sciatic nerve or its components. When the same test was performed on the left side, the leg could be raised about 70° and when it was raised higher, gave an increase in low back pain on the right side but no sciatic pain. The hip flexion test gave also an increase in low back pain. The hip extension test gave slight increase in the low back pain. The hip extension test gave slight increase in the right lower back pain. The doctor next described the distribution of nerves from the brain which end in the low back region, and from which point another neuron or another nerve would take over, and then go to the lower extremities. He described a center in the low back that supplies the lower extremities, and the location of the spinal cord inside the backbone, which could be compared to a cable that carried lots of wires. Out of the spinal cord come the nerve roots, the doctor testified, which would be the wires coming out of the cable; and if there is any damage to the backbone or the structures around the backbone that may push against that cable, or the wires emerging from that cable, then this damage may be felt in the distribution

of these wires, or in our human body, the nerves as they project themselves in the lower extremities.

The examination performed by the doctor had as its purpose ascertaining whether there was some involvement of the cables and nerve roots, and the weakness in the right calf musculature and atrophy therein would indicate there was some involvement of the nerves supplying those muscles. And in the calf musculature, it is foremost L5 nerve root and S1 nerve root which have to be considered. The doctor testified to a distinction between atrophy arising out of disuse by saying that if the atrophy was of some significant degree, it was usually the result of damage of nerves which supply the muscle. If a muscle is without nerve supply, it will show shrinkage or atrophy, which is the significant in the marked type of atrophy. The atrophy of disuse usually comes from a very definite disuse such as a limb being in a cast, and it is usually not as marked as the atrophy that ensues when the nerves to the muscle are damaged.

The reduction of the normal lordosis or lumbar curve usually indicates some irritation to the muscles giving them some spasms, or sometimes the patient splints against a painful motion by holding the back rigid and that will give some reduction of the lordosis.

The usual lumbar spine, the doctor testified, has great flexibility and can be moved well from forward to backwards and somewhat less well from side to side. If these motions are restricted, it would usually indicate that there is some pathology in the back preventing the patient from using the back to full extent. This may be due to actual pathology, contravening this motion, or it may be due to muscle spasm, or it may be due to pain that the patient does not use the back in a case like that.

The sensory diminution over the dermatone which the doctor described had significance in that if there is pressure against nerves, there will be some sensory diminution if it is long enough and severe enough and it usually helps in the diagnosis to determine which nerve is involved. The leg-raising test is a particularly good test to check on irritation of the sciatic nerve or the components of the sciatic nerve.

The doctor gave as his opinion that the patient most likely had a radiculitis involving the L5 and S1 nerve root on the right. Radiculitis means involvement of the nerve root of L5 and S1 on the right, and with the history that the doctor had obtained, that this patient had a previous operation, it was the doctor's feeling that most likely the radiculitis was secondary to the previous disc removal and operation, and the doctor felt that there were residuals of the previous pathology which supposedly had been removed.

He recommended that the patient continue with conservative treatment and then he said only if completely unable to give the patient relief with conservative treatment one should consider a re-exploration in order to free the patient of the scar formation and possibly to perform a posterior rhizotomy—which is cutting the pain fibers of these nerves—if it were found that the root was irreparably damaged, in order to give the patient relief. On a later visit, the doctor did recommend a repeat myelogram, and on March 7, 1960, the doctor hospitalized the patient at Schumpert Sanitarium, and a myelogram was performed at that time (S.F. 182-183). The patient was seen again on May 16 and on June 15, 1960, at which times he would say that in essence, the complaints of the patient were quite the same. On this visit, the patient was emotionally upset about the death of his mother-in-law which had upset his wife, and the whole family situation was said by him to be

in an uproar, which the doctor concluded was an additional factor in the particular visit. At this time, medicines were recommended and a hydrocollator, which is a device which supplies steam to an area. Again the doctor recommended conservative treatment.

On the examination on June 15, the complaints of the patient were of numbness of the right leg up to the knee, and at that time, the doctor felt that inasmuch as the patient's pain seemed to have not really responded well to conservative treatment, that one should very much consider a reoperation. The doctor also stated to the patient that he could not make any definite promises as to the success of such a reoperation inasmuch as the doctor did not know what state these nerve roots would be in when he found them, but felt that if the patient's pain was very severe, that he should have such a re-exploration. At the time, the patient stated that he would think over the matter of having the re-exploration, and on July 18, 1960, notified the doctor's office by telephone that he had decided against having surgery performed at that time.

Reverting to the myelogram performed March 7, 1960, the purpose of the test was described by the doctor as an additional help in diagnosis, and in itself is a test in which the doctors perform a spinal puncture, which is a needle puncture of the spinal cord, and then examine the spinal fluid, test the manometric situation, which means seeing what the spinal fluid flow is like, and then instill some medicine into the spinal canal which medicine has the property that it shows on x-ray, and then the doctors take x-ray pictures, make fluoroscopic studies and see what the spinal canal looks like.

Following a description of the structure of the spinal canal and nerves, which are normally surrounded by spinal fluid and covered by different membranes, along with ar-

teries and veins and supporting structures in the spinal cord, the doctor testified that if something else should be in the canal pressing or pushing into it, you would have an abnormality. Such a pressure may be apt to cause the nerve dsturbance which he described in the petitioner. On making the spinal puncture, it was found that the fluid was clear and the initial pressure of the same was 140 mm. which would be considered normal; the manometric tests performed on the spinal fluid were negative and there was no sign of obstruction of the spinal fluid flow. When the doctor introduced the pantopaque (a fluid opaque to x-ray), which is the medicine used to visualize the area, the doctor found that the myelogram showed a questionable defect at the level of L4. This would be the fourth lumbar vertebra and from the appearance of the x-ray defect, it was felt that it was more likely that the patient had an old scar formation around the nerve root rather than a new herniation of a disc, and it was the doctor's feeling that the patient apparently had residuals from his previous disc pathology and that he had formed scar formation from pressing the lumbar nerve roots, particularly the L5 nerve root, which is the one that runs at the L4 vertebra on the right side. Scar tissue may form after injuries or following surgery.

The last visit the patient made to see the doctor was on September 27, 1960, at which time the doctor found no significant changes in him. The patient reported that he had good and bad days, or that there was some variation in his feelings, but the doctor testified that is what was found with most any condition, and that the patient still has essentially the pain in the right lower back and in the right posterior leg. He compla ned of some numbness in the right posterior lateral foreleg and foot and of that he had complained previously. Before the last examination, the patient had asked the doctor's permission as to whether he should or should

not take a job, and the doctor had encouraged him and told him that he should try to take a light job and see what he could do with it, and then on the last visit, the patient informed the doctor that he had taken a job with a package liquor store company, and that he worked there, but that the work entailed the lifting of cases of beer and that he was unable to do it, and that he had had to quit his work after about 9 days. That was part of the history the doctor obtained at the last visit. The findings were very much the same, and the doctor's conclusion was that the patient still had the evidence of showing some nerve root involvement of L5 root and maybe some of the S1 root, mostly on the right.

The doctor gave it as his opinion that the patient in his present condition was not able to engage in work which required sustained heavy lifting or stooping, bending and that sort of thing, heavy manual labor. Next, he described the nature of the re-exploration of the L4 region and the L5 region as being an operation as would be designed to free the nerve roots of scar tissues or any other pressures that might be found on them. If he should find that the nerve root was irreparably damaged on such an operation, and that it looked real bad, then he would feel that in his judgment, he should have a rhizotomy, which is sacrificing the part of the nerve root that conducts pain, by cutting it, and he would feel that such a rhizotomy would be indicated to give him pain relief, at the expense of feeling numb in the left leg after it.

On cross-examination, the doctor testified he had not had the benefit of seeing myelogram studies or reports of a myelogram made prior to the operation the patient had already had, and that he would not know whether there was a herniated disc there or not, except from the history. The doctor gave as his diagnosis that the patient had a radiculit s,

meaning an involvement of the nerve roots of L5 and S1 on the right side, and this was based on many findings, and that most likely the radiculitis or nerve root involvement was secondary to residuals from previous pathology or operation. It can very often happen, the doctor testified, that patients who have had nerve root pressure for some length of time and undergo an operation, will never completely recover from that nerve root pressure and will remain to show a radiculitis. This will not infrequently happen, it may happen also secondary to the operation itself.

The doctor testified that there would be a reasonable chance of relief in the case from another operation, but a lot depended on the findings. He testified that even in the very best of hands, if a nerve is already badly damaged, then even if one frees this nerve completely of scars or pressure or anything that may interfere with it, it may not completely recover. That the doctor thought that in a case like that of the patient's, where the patient had had so many complaints and where they have yielded so very little to treatment, that he would think an operation would stand a chance, probably better than an even chance, to offer him some relief.

The doctor testified that the operation was one that was acceptable and recommended by a neurosurgeon as a measure for relief in this type of situation and that the disc operations themselves and also nerve root operations like rhizotomies and so on are some of the more frequent operations in the repertoire of a neurosurgeon. He opined that the individual case had to be judged by the findings really, and that one could not talk about statistics when it comes to such individual cases, but that he had been successful in most of the cases in giving relief.

The operation was described as one to remove the scar tissue surgically and thereby eliminate and take away the

pressure element, a procedure both anatomically, pathologically and mechanically possible, and one frequently done by neurosurgeons. A second measure was described whereby after evaluation of the situation and having looked at it, upon operation the surgeon, if he felt there was no feasible way to remove the scar tissue, could perform a rhizotomy; which probably could be done at the same operation. The rhizotomy, the doctor would say, would give the patient a fairly good chance to get relief, particularly if the pain was well localized; that it is a very successful operation if the pain is merely confined to one or two nerve roots, but if it is a more widespread pain, the operation is less successful. The doctor concluded that he thought the pain was fairly well localized, and that the operation would stand a fairly good chance for success, and that the operation had been recommended to this patient for the reason that he had so badly failed to respond to other treatment. The patient is not functioning well as it is, and the doctor felt that at worst, he would probably not be worse than he is now, and at best, maybe much better, even to the extent of procuring enough relief to engage in remunerative employment, assuming the operation is successful.

The operation of a laminectomy and a rhizotomy would be the more extensive type and usually required 10 days to two weeks in the hospital, and then a convalescent period of about one month at home. After that period, assuming that the operation is successful, it would depend on what type of work a person would do as to how soon he could return to it. A white collar or desk worker might be allowed to go back after the short period of convalescence, but if a person was doing more involved work, more physically involved work, the doctors would say to wait another three months perhaps. If a person performed heavy work, the doctors might say that he could do light work, let us

say for a period of six months, and then try on harder work after that. That is if the operation is completely successful, but there is room, of course, for the possibility that it is not completely successful, then these figures would vary.

The doctor gave it as his opinion that he thought the patient would stand a reasonably good chance of being improved and freed of some of his pain, but he was not quite sure that he would definitely be able to go to heavy manual labor. His opinion was that the patient should probably be able to do moderate labor fairly well. That he could do moderate work which would not necessarily be white collar work but not necessarily be heavy work; that one would really have to go into specifics to be able to make a better answer.

On redirect examination, Dr. Faludi testified that from his observation of the patient over a period of several months, he felt that his condition was stationary and that he doubted very much that with conservative treatment he would substantially change. Turning to the question of disc operations, the doctor testified that statistics vary with different clinics that report them; that his own statistics in disc surgery about he would say that perhaps at least 70% are very substantially improved or even part of them cured of the pain. This would leave about 20% of cases that would be unimproved, and the doctor would say that there may be 10% who actually may be worse after disc surgery. The statistics were described as being overall, as he looked at the question in his own experience, and with the experience of others with whom he had been associated, but that the statistics do not pertain to one particular patient; because if the doctor would get, for instance, an acute disc herniation in a young individual, very localized to one nerve root, he would say that his chances are 95% good that he would do very well. But when you take long-

standing cases, neglected cases, old people and all the bad risk cases together with the good ones, then you get statistics like that. The doctor testified he believed now that the petitioner would not be in the good risk group any more, but would probably be somewhere in the poor risk group.

On specific hypotheses, the doctor testified that stooping alone and bending alone very often could be done by patients with the disc operation, but by use of the knee action rather than with the back action, and that the doctors recommended often in such type of case that the patient should not stoop and bend his back, but stoop by bending his knees and get down. If the work required lifting at the same time, the doctor would feel that heavy lifting, let us say, 50 lbs. or more, would be probably contra-indicated in a patient of this type. Moderate lifting with the help of knee action should be possible, perhaps if the operation were successful, maybe not at the very first, but maybe after six months' period of time or so.

The doctor would not, as a physician, feel that the patient should do work such as climbing a 12 ft. ladder four times a day, 6 to 12 times a day; that he would probably try to get the patient assigned to some other type of work; that he would feel it would be somewhat strenuous for him.

The doctor gave it as his opinion that $1,500 would be quite an adequate amount for the contemplated operation and its incidents, except for possibly a very severe complication that would not be foreseen.

On re-cross-examination, the doctor testified in response to an hypothetical question that if the operation would fulfill all the hopes and expectations that the doctors would have of it, the patient may be able to do work that did not involve heavy lifting but did involve riding on a train, getting on and off an engine, giving signals and using the hands and arms, and that sort of activity that did not in-

clude the lifting of packages or heavy items, objects of 50, 60 or 70 lbs. and work of a nature that was not a lifting job but rather a job of presence, and perhaps giving of signals on the railroad and so on, which involved the use of the shoulders and the hands rather than the lifting processes, such as a laborer, but that if the operation should fall short of all the hopes and expectations for it, the patient might fall short of doing that type of work.

Charlie H. Flowers testified by way of deposition that he was a representative salesman of American General Life Insurance Company and as such, familiar with the rate book used by it that quoted rates for different types of life insurance and annujties. He properly identified the Commissioners' 1941 Standard Ordinary Table of Mortality which was introduced in evidence, as identified in his rate book, and also the table from the rate book showing the costs of various annuities, including the single premium immediate life annuity, that was likewise introduced in evidence.

From the table, he gave testimony that the cost of a single premium immediate life annuity to pay the sum of varying amounts per month to a person 48 years of age over his life expectancy would be as follows:

For $625.00 monthly, the single premium would be $145,144.37.

For $800.00 monthly, the single premium annuity would be the sum of $185,784.00.

From the same table it is mathematically demonstrable that to provide a monthly income of $750.00 per month, the single premium for an immediate life annuity would be $174,173.25. The Commissioners' Standard Table demonstrated that a person 48 years of age had a life expectancy of 22.88 years.

There was no rule for involuntary retirement at age 65 in force on the railway of the respondent, as evidenced by the testimony of *Joseph Corrigan, Jr.*, engineer on the run with the petitioner when he was injured, to the effect that he was 69 years of age, and had been a locomotive engineer since 1916.

Mrs. Homer Simmons, wife of the petitioner, testified that she had married him in 1936. Further, that Mr. Simmons had engaged in oil field work and other work requiring lifting and carrying until he began railroad work. She stated that he had been regularly employed until he was hurt in May of 1959. In addition to his labors, he performed services around the house, such as moving furniture when it was desired to be moved, getting on the roof and cleaning out gutters, going up through a closet to the attic to turn the heating unit on and off, when seasons required, all of the yard work, including the planting of grass, flowers and shrubs.

She reiterated the facts concerning the petitioner's enjoyment of fishing and hunting prior to his injuries, and his engaging in such sport on every opportunity that he could in the course of which he actually trained dogs, and even after giving some to friends, would keep several at a time.

She parked at the side of the Union Station to meet him following his injuries, at which place there were slight steps that had to be used in coming down to the parking area, and she observed that the petitioner when he arrived hardly manage to get down these which alarmed her. He was helped in the car by Mrs. Simmons, and the next morning, a call was made to see if he could see a doctor. This could not be done the first day, even though petitioner waited at the doctor's office until he was worn out, and indeed it was the third day after he was injured that he finally saw a doctor.

Prior to seeing the doctor, he had been given home treatment, particularly on the night that he arrived, but he did not rest that night. On seeing a doctor, hospitalization was suggested, and he was given heat treatment, to perform which the Simmonses purchased a heating pad and Mrs. Simmons would massage his back. The petitioner was spending all of the time in the house save when he made trips to the doctor's office, and was not able to be up. He made complaints of the lower part of his back and right leg in particular.

The petitioner was taken to the hospital in a car by the witness and walked in with her assistance. On the Monday that the petitioner was discharged from the hospital, the witness in response to a telephone call went to his bedside and found him sitting on the side of the bed, following which she helped dress him. With the assistance of a man in the area, the witness got the petitioner down a few steps from the door of the hospital, and upon reaching home, was put to bed. He was still making complaints of present pain in the same area, his back and leg. On up until his entry in the hospital, about the 13th or 14th of July these complaints continued, particularly when he would stay in one position too long or try to get up out of the chair, or go down steps, not stairs, because he couldn't.

Following the operation, the witness saw the scar on petitioner which was approximately 6 or 7 inches, beginning at the waistline and extending below, and in approximately the center of the back. Another patient who had received a disc operation after that of Mr. Simmons was situated in the same room with him, and had gone home before the petitioner was permitted to sit up some three weeks following his operation.

The petitioner was in the hospital about a week after he first sat up following the operation, and thereafter, on

the doctor's decision, returned to his home where he remained in bed several weeks. His complaints of pain in the lower portion of his back and right leg continued over this period, and indeed, had never stopped completely at the time of trial.

After the petitioner began to get up and get around the house, he had some limitation of motion or movement, and over the last six or eight months preceding the trial the witness had seen no appreciable change in the way petitioner got about. He continued to receive treatment at home in the nature of the use of a heat pad, liniment and the rubbing of his back and leg. On occasions when the petitioner would take some kind of a trip in a car, or get out and walk around, the witness would notice a great deal of change in that he would not rest much at night after such trips.

The petitioner was recalled to the stand by the respondent, and asked if he had made any effort to return to work for the railroad in the last three or four months, to which he replied he had not.

On examination by his counsel, petitioner testified that he had made an effort to resume his duties since he was injured; that he had told Mr. Rymand, of the legal department of The Kansas City Southern Railway that he was willing to return to work, if the doctor would give petitioner a letter saying he was able to resume all responsibilities of a fireman and locomotive engineer; and if Rymand would give petitioner a letter saying that he would accept the doctor's decision and be responsible for the condition of petitioner, which Mr. Rymand declined to do. This occurred shortly before the petitioner employed counsel around June 1, 1960.

MAY 25 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 865

HOMER R. SIMMONS, *Petitioner*

v.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Respondent*

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice and The Associate Justices Of The Supreme Court Of The United States:

The Kansas City Southern Railway Company, Respondent herein, prays that the Petition for Certiorari of Homer R. Simmons, be dismissed, or, in the alternative that it be denied. Respondent denies jurisdiction and denies error, and in support of such contention presents the following:

STATEMENT OF THE CASE

Petitioner brought an action in the District Court of Jefferson County, Texas, against Respondent under the provisions of the Federal Liability Act, 45 *U.S.C.A.*, Section 51-59, as amended, (hereinafter referred to as "F.E.L.A."). Upon trial of the case, the jury returned a verdict in favor of the Petitioner in the sum of One Hundred Thirty-Nine Thousand Six Hundred Fifteen and No/100 ($139,615.00) Dollars. Prior to the trial, the parties stipulated that a credit would be due the Respondent against any judgment, in the sum of Four Thousand Nine Hundred and No/100 ($4,900.00) Dollars, representing advancements theretofore made to the Petitioner by Respondent. After verdict, judgment was entered for One Hundred Thirty-Four Thousand Seven Hundred Fifteen and No/100 ($134,715.00) Dollars, being the difference between the verdict and the aforementioned credit. (A copy of such judgment, reflecting the nature of the $4,900.00 credit, appears at pages A-1 and A-2 of Simmons' Petition.)

The case was appealed by Respondent to the Court of Civil Appeals in the Ninth Supreme Judicial District. Such court affirmed the trial court on all points save the question of damages, holding the verdict and judgment to be excessive and suggested a remittitur in the sum of Forty Thousand and No/100 ($40,000.00) Dollars, (Opinion reported at 350 S.W. 2d 844 and set out in full at pp. A2-A8 of Simmons' Petition).

In suggesting a reformation of the judgment to reflect the $40,000.00 remittitur, the Court inadvertently failed to credit Respondent with the Four Thousand Nine Hundred and No/100 ($4,900.00) Dollars covered by the aforementioned stipulation.

Upon motion of Respondent, the Court of Civil Appeals acknowledged its mathematical error and allowed the credit of Four Thousand Nine Hundred ($4,900.00) Dollars, reducing its suggested judgment from Ninety-Nine Thousand Six Hundred Fifteen ($99,615.00) Dollars to Ninety-Four Thousand Seven Hundred Fifteen ($94,715.00) Dollars. (The Court merely corrected its own error to reflect the stipulations and agreements of the parties, and did not, as suggested by Petitioner at page 11 of his Petition ". . . like Lizzie Borden, after giving the Petitioner 40,000 whacks, . . ." redetermine the amount of remittitur.)

Petitioner thereupon filed Application for Writ of Error to the Supreme Court of Texas, which writ was refused.

JURISDICTION

Jurisdiction is denied. Although the action was properly brought under the Federal Employers Liability Act (45 *U.S.C.A.*, Sections 51-59, as amended) such does not, in and of itself, create special jurisdiction nor furnish any extraordinary grounds for the Court to exercise its discretion in granting certiorari, there being no federal statute, or rule of this Court, creating jurisdiction peculiar to Federal Employers Liability Act cases. The petition for certiorari of petitioner cites no such statute or rule giving the Court any additional jurisdiction or additional discretion in a case of this type.

Petitioner contends that jurisdiction is sustained by 28 *U.S.C.A.*, Section 1651, Sub-Section (2). Such Section does not authorize certiorari to state courts, 28 *U.S.C.A.*, Section 1257 being the only proper statutory authority for such proceedings.

Insofar as Petitioner contends that there is jurisdiction under 28 *U.S.C.A.*, Section 1257 because he has been denied either the right of trial by jury in contravention of the Seventh Amendment, or some un-named "federal right", the Respondent's grounds for denying such jurisdiction are contained under the heading of "Argument and Authorities" under Respondent's Counterpoint No. 2.

COUNTERPOINTS OF RESPONDENT

1. The sole question presented by the Petition of Simmons is whether the requiring of a remittitur in an F.E.L.A. case by the Texas Court of Civil Appeals, which has the exact same scope of authority as the trial court, under the Texas Rules of Civil Procedure, to review judgments for excessiveness and require remittiturs in proper cases, denied Simmons the right of trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States.

2. Where the claimant has exercised his option in filing an F.E.L.A. case in the state court, the review of jury verdicts as to excessiveness, and the requiring of remittiturs where they are indicated, according to local practice, does not deny such right of trial by jury to a claimant, whether such power of review is exercised by the trial or appellate court.

3. The action of the Court of Civil Appeals in requiring a $40,000.00 remittitur in this case was supported by the record in the cause.

Respondent's Counterpoint No. 1 Restated

1. The sole question presented by the Petition of Simmons is whether the requiring of a remittitur in an F.E.L.A. case by the Texas Court of Civil Appeals, which has the exact same scope of authority as the trial court, under the Texas Rules of Civil Procedure, to review judgments for excessiveness and require remittiturs in proper cases, denied Simmons the right of trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States.

ARGUMENT AND AUTHORITIES

Petitioner represents that three questions are presented to the court in this proceeding. The self-serving manner in which these purported questions are framed tends to obscure the real question in issue, and it would seem well at the outset to analyze petitioner's position in order to narrow the issue in controversy.

In his first "Question Presented" he contends that he has been denied the right of trial by jury because the Court of Civil Appeals required a remittitur" . . . by exercising its original discretion, not restricted by the facts adduced on trial . . .". This represents a self-serving conclusion of the petitioner and is, in fact, clearly rebutted by a reading of the opinion of the Court of Civil Appeals, which is quoted in the appendix to Simmons' petition. A reading of such opinion, particularly those portions appearing at pages A-5 through A-7 of Simmons' petition; indicates that the court very carefully considered the evidence adduced on trial in determining that the verdict was excessive, and referred to other reported cases only as an aid in exercising its sound judicial discretion to determine what would be reasonable under the circumstances.

"Questions Presented" Nos. 2 and 3 of the Petition are self-serving conclusions of the petitioner, and beg the question supposedly presented in "Question Presented" No. 1, in that they presuppose that the Texas Court of Civil Appeals was bound by the rule of practice in federal courts which limits the scope of review on excessiveness in federal appellate courts to an examination of the discretion exercised by the trial judge in his handling of the matter.

The limitation of scope of review is imposed on the federal courts by the operation of the Seventh Amendment to the Constitution of the United States (*Lumbermen's Mutual Casualty Company v. Elbert*, 348 U.S. 48, 75 S. Ct. 151 (1954), See, e.g., footnote 5, 75 S. Ct. at page 154), while Rules Nos. 328, 439 and 440 of the *Texas Rules of Civil Procedure*, set out in full at pages A-17 and A-18 of Simmons' petition, when taken together, authorize a broader scope of review than that allowed to federal appellate courts. "Question Presented" No. 1 inquires as to whether the Seventh Amendment applies to state courts, and, as will be shown, it most assuredly does not.

To reframe slightly, the real question is whether the state appellate court is *required* to follow the procedural rule imposed upon federal courts by the Seventh Amendment, and not whether it *did or did not* follow such rule, as is suggested by petitioner in his "Questions Presented" Nos. 2 and 3, there being no question that the Texas procedure varies from the federal procedure.

Respondent's Counterpoint No. 2 Restated

2. Where the claimant has exercised his option in filing an F.E.L.A. case in the state court, the review of jury verdicts as to excessiveness, and the requiring of remittiturs where they are indicated, according

to local practice, does not deny such right of trial by jury to a claimant, whether such power of review is exercised by the trial or appellate court.

ARGUMENT AND AUTHORITIES

With deference to the spirit of Rule 40 of the *Rules of Practice* in this court concerning brevity and conciseness of briefs, Respondent will not attempt a detailed analysis of the many and varied arguments appearing in Simmons' petition. The general import of these various arguments will here be only briefly characterized.

Simmons emphasizes the fact that in such cases as *Brown v. Western Railway of Alabama*, 338 U.S. 294, 70 S. Ct. 105 (1949), this court has stated the necessity of protecting federal rights from "over-exacting local requirements". Petitioner then points out that the Texas procedural rule governing scope of review for excessiveness in appellate courts differs from the federal rule, which in and of itself seems to vary from Circuit to Circuit. He concludes that this Court should grant certiorari in this case and announce (1) a standard rule of procedure for all federal courts in these matters, and (2) that such procedural rule limiting the scope of review of federal courts to an examination of the discretion exercised by the trial judge in passing on the excessiveness question should be imposed on all state court systems when dealing with F.E.L.A. cases.

In support of these contentions, petitioner presents a rather lengthy history of the F.E.L.A. cases in which this court has reviewed the handling of them in state courts, holding that federal law and not state law governs the action. As will be pointed out, the cases so cited deal with matters of substance—the very nature of the cause of action created by the F.E.L.A.—and not the procedural

handling of such cause of action. This court has, with equal consistency, held that the procedural handling of F.E.L.A. cases is a matter to be left to the rules of the state courts.

The fact that Congress saw fit to expressly grant *concurrent* jurisdictions to state courts to try F.E.L.A. cases, in logic, excludes the premise that the grant intended to make the state courts into federal courts when trying such cases. And it is elemental that Congress, in providing for the enforcement of federally created rights in state courts, takes the state courts as it finds them concerning procedural rules governing the conduct of litigation, which have been provided by the state for all litigants who seek redress from its courts. In *Brown v. Gerdes*, 321 U.S. 178, 64 S. Ct. 487 (1944), Justice Frankfurter pointed out in a concurring opinion, 64 S. Ct., at page 493:

> "The simple fact is that from 1789 to this day, no act of Congress has attempted to force upon state courts the duty of enforcing any right created by federal law on terms other than those on which like litigation involving rights other than federal rights is required to be conducted in a state court."

And at 64 S. Ct., page 494:

> "The federal law in any field within which Congress is empowered to legislate is the supreme law of the land in the sense that it may supplant state legislation in that field, *but not in the sense that it may supplant the existing rules of litigation in state courts.*" (Emphasis added)

Again, for the sake of brevity, respondent will not attempt to cite the legion of cases in which this Court has

held that the Seventh Amendment jury trial requirements do not apply to litigation in state courts. Specifically, however, in *Minneapolis & St. Louis Railway Company v. Bombolis*, 241 U.S. 211, 36 S. Ct. 595 (1916), in an unanimous opinion, this court most emphatically stated that such is the law in F.E.L.A. cases tried in state courts. At 36 S. Ct., page 596, this court states:

> "Two propositions as to the operation and effect of the 7th Amendment are . . . conclusively determined . . . (a) The first ten amendments; including, of course, the 7th, are not concerned with state action and deal only with federal action. (citing numerous cases) . . . (b) The Seventh Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever, govern or regulate trials by jury in state courts, or the standard which must be applied concerning the same." (citing numerous cases).

Further, in *Second Employers Liability Cases*, 223 U.S. 1, 32 S. Ct. 169 (1912), this court, in construing the meaning of the "concurrent jurisdiction" feature of the F.E.L.A., said 32 S. Ct. at page 178:

> "We deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, *or to control or affect their modes of procedure*, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the Act of Congress." (Emphasis added)

In *L. & N. RR Co. v. Stewart*, 241 U.S. 261, 36 S. Ct. 586 (1916), it was said (36 S. Ct., at page 588):

> "The notion that a substantive right vesting under the law of one jurisdiction cannot be recognized and enforced in another, at least as between the United States and the States, unless by procedure identical with that of the first, is disposed of in *Minneapolis & St. Louis v. Bombolis*. . . ."

And, in *Dickinson v. Stiles*, 246 U.S. 631, 38 S. Ct. 415 (1918), it was said (38 S. Ct., at page 416):

> "The Minnesota statute . . . affects neither the amount recovered nor the person by whom it is recovered nor again the principal of distribution. It deals only with the necessary expenses of recovery. Congress . . . did not regulate attorneys' fees. *It contemplated suits in the state courts and accepted state procedure in advance.*" (Emphasis added)

Bombolis and *Stewart*, supra, involved the question of whether the state rule allowing a majority rather than unanimous verdict denied the parties the right of trial by jury in F.E.L.A. cases, and *Dickinson*, supra, involved the question of whether or not the Minnesota statute concerning attorneys' fees should be applied in F.E.L.A. cases.

In still another case, the court stated in *Missouri Ex Rel, Southern Railway Co. v. Mayfield*, 340 U.S. 1, 71 S. Ct. 1 (1950), in an F.E.L.A. case tried in the state courts of Missouri (71 S. Ct., at page 3):

> "Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion federal law as enunciated by this Court to so hold, it should be relieved of that compulsion. It should be free to de-

> cide the availability of the principal of *forum non conveniens* in these suits according to its own local law."

That the general principle announced in *Bombolis*, supra, and the other cases cited above—that procedural rules of the *forum* are to be applied in the handling of F.E.L.A. litigation with the federal decisions applying only to questions going to the substance of the cause of action—remains inviolate is apparent from a careful reading of the cases cited by petitioner for his proposition that the federal rule of decision should apply to both procedural and substantive matters.

In *Brady v. Southern Railway Company*, 320 U.S. 476, 64 S. Ct. 232 (1943), it was said that 64 S. Ct. 234:

> "Only by uniform federal rule *as to the necessary amount of evidence* may litigants under the federal act receive similar treatment in all states. (Citing cases). *It is true that this Court has held that a state need not provide in FELA cases any trial by jury according to the requirements of the Seventh Amendment.* (Citing Bombolis) But when a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question."

Thus the Court has said that question of *who* is to determine sufficiency of the evidence is a matter of local procedural rules, the question of *what constitutes* sufficient evidence under the Act being the only federal question involved.

The same question, presented in a different manner, was involved in *Brown v. Western Railway of Alabama*, 338 U.S. 294, 70 S. Ct. 105 (1950).

The Court, at 70 S. Ct. 106, while pointing out the difficulty in distinguishing between substance and procedure in some areas, acknowledges that the distinction must be made and that the federal rule of decision is to be applied only to questions of substance.

As to the necessity of making the distinction in cases concerning sufficiency of the evidence as governed by local rules, the Court states:

> "Fortunately, we need not attempt to do so. A long series of cases previously decided from which we see no reason to depart, makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress."

Again, the Court is saying that it will look at *what* constitutes sufficiency of evidence or pleading under the statute, and not *who* in the local judiciary system determines the question.

Even in *Dice v. Akron, Canton and Youngstown Railway Co.*, 342 U.S. 359, 72 S. Ct. 312 (1952), the majority opinion recognizes and reiterates the rule in *Bombolis* and does not attempt to overrule it, although the case has been cited as going the fartherest of any case in imposing the federal jury trial rules upon state courts.

The above cases are representative of those cited by Simmons in his petition in support of his argument that the Seventh Amendment jury trial rules should apply to F.E.L.A. cases in state courts. That the cases do not so hold is apparent. The questions presented in those cases, and almost all of the other cases cited in Simmons' petition —sufficiency of evidence and pleading and determination of issues of liability—were extremely close as concerns

whether the state rules had a procedural or substantive effect upon their determination. Yet in each of these cases, this Court recognized the necessity of making the distinction and applying the federal rule of decision *only* to matters going to the substance of the cause of action created by the F.E.L.A.

Just as in the *Brown* case, supra, where the Court stated that the distinction between substance and procedure had been made in cases concerning sufficiency of the evidence, in favor of Supreme Court review, respondent submits that the distinction has also been made by this Court concerning the very question here presented, and that such distinction has been made in favor of leaving the question of scope of review of state appellate courts on excessiveness within the procedural realm not reviewable by this Court.

In *Rogers v. Missouri Pacific*, 352 U.S. 500, 77 S. Ct. 443 (1957), this Court reversed a judgment entered by the Supreme Court of Missouri and ordered the jury verdict reinstated. After making its ruling on sufficiency of the evidence to support the verdict, this Court referred to "other questions not decided below" (including the question of excessiveness of the verdict) and stated, 77 S. Ct. at page 451:

> "We have considered the remaining questions not passed upon and find them to be unsubstantial".

On remand, the Supreme Court of Missouri reconsidered the case and stated, 308 S.W. 2d 688 at pages 691, 692 and 693:

> "It seems then, that the effect of the United States Supreme Court having determined that certain questions raised in but not passed on by the Missouri

> Supreme Court were unsubstantial would depend upon whether those questions were Federal questions, that is, whether they involved Rogers' substantive rights claimed under the Federal Act, or whether they were questions exclusively for consideration and disposition by the Supreme Court of Missouri . . . we are of the opinion that the question of excessiveness of verdict was a non-federal question and one, therefore, to be decisively determined by the Supreme Court of Missouri.
>
> "It follows, therefore, that the opinion of the United States Supreme Court to the effect that the question *relating to the claimed excessive verdict in the Rogers case was unsubstantial was a ruling that a non-federal question not passed upon by the Missouri Supreme Court was an unsubstantial question . . .*" (Emphasis added)

Much more compelling is the saga of *Deen v. Gulf, Colorado and Santa Fe Railway Co.*, an F.E.L.A. case which came up through the Texas appellate courts involving, among others, the exact question here presented. At the outset, the Texas Court of Civil Appeals reversed and entered judgment for the railroad (275 S.W. 2d 529). This Court reversed (353 U.S. 925, 77 S. Ct. 715) (1957) and remanded for judgment for the plaintiff. On remand, the Texas Court of Civil Appeals affirmed the judgment on the entry of a remittitur of $5,500.00. (306 S.W. 2d 171). The Texas Supreme Court affirmed the remittitur but reversed with directions to pass upon the manifest weight of the evidence. Separate petitions for certiorari against the railroad and for mandamus against the Texas Supreme Court were filed in this Court. The certiorari questioning the remittitur was denied (358 U.S. 875, 79 S. Ct. 111) (1958). The petition for mandamus was al-

lowed and the Court held that consideration of the weight of evidence had been foreclosed by the previous opinion. (358 U.S. 57, 79 S. Ct. 1) (1958).

The Texas Supreme Court then entered judgment that affirmed the remittitur. (317 S.W. 2d 913). In so doing, the Court stated, 317 S.W. 2d at page 914:

> "As to this, it is enough to say that, since we have heretofore decided, as above stated, that the Court of Civil Appeals had the power to require the remittitur, and since the above described action of the Supreme Court of the United States conspicuously forbears to disturb that part of our decision, but on the contrary, denies the writ of certiorari wherein the plaintiff sought to review it, we must decline to reconsider the question on its merits."

Thereupon, Deen filed a third petition for certiorari raising the sole question of whether the Texas courts, in view of the 7th Amendment, could order a remittitur under the Texas Rules of Civil Procedure, being the exact, same and identical question here presented. Such petition cited substantially the same authorities as are cited in Simmons' petition. It put squarely before the Court the exact question which is here presented, and, in fact, put it before this Court the second time in that case. The petition was denied, (with the notation: "Mr. Justice Douglas is of the opinion that certiorari should be granted.") 359 U.S. 945, 79 S. Ct. 725 (1959).

Petitioner refers to the *Deen* case, but brushes it off, citing the language of this Court in *Atlantic Coastline RR Co. v. Powe*, 283 U.S. 401, 51 S. Ct. 498 (1931), that "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the Bar has been told many times. . . ." Such may be true in the

ordinary case, but there is nothing ordinary about the saga of Earl R. Deen. In view of the oft cited language in *Brown*, supra, and other cases cited in Simmons' petition, to the effect that this Court will grant certiorari in every case in which it feels that the rules of local practice have denied claimants under the F.E.L.A. the substantive rights guaranteed by the Act, and the fact that the question here involved was squarely and unequivocally presented to this Court twice in the same case by petition for certiorari, respondent views the denial of certiorari as representing the opinion of this Court that there is no merit in the contention here being made.

That such is the effect of the *Deen* saga has been the conclusion in at least two jurisdictions (*Missouri Pacific RR Co. v. Kimbrell*, 160 Tex. 542, 334 S.W. 2d 283) (1960); *Smith v. Ill. Cent. R. Co.* (Ill. App.), 172 N.E. 2d 803 (1960). In almost every other jurisdiction in the United States, the rule that local rules govern the scope of review on excessiveness of damages and remittitur practice is followed. See e.g., *St. Louis and San Francisco Ry. Co. v. King* (Sup. Ct. Okla.), 278 P. 2d 845; *Joyce v. Missouri, Kansas and Texas Ry. Co.* (Mo.), 189 S.W. 2d 568; *Rivera v. Atcheson, Topeka and Santa Fe Ry. Co.*, (Sup. Ct. N. M.), 299 P. 2d 1090; *Vivian v. Atcheson, Topeka and Santa Fe Ry. Co.* (Sup. Ct. N. M.), 363 P. 2d 620.

Respondent submits that the Texas Rules of Civil Procedure, previously cited, granting to the Texas Court of Civil Appeals the same scope of review for judgments as to excessiveness as the trial court has, is clearly procedural and has no effect whatsoever in the substantive rights of the claimant. Petitioner does not deny, and, in fact, seemingly admits, that all *trial* courts, both state and federal,

have the power to do what was done here by the Court of Civil Appeals. The well reasoned opinion in *Dagnello v. Long Island R. Co.*, 289 F. 2d 797 (2nd Cir. 1961) we think puts to rest once and for all the question of whether or not federal courts, under the 7th Amendment, may review verdicts for excessiveness, and require remittiturs in proper cases. The case presents an exhaustive review of the history of remittitur practice on appeal, and concludes that it is part and parcel of the common law and therefore, as a substantive matter, federal appellate courts may review verdicts for excessiveness and require remittiturs where proper, being limited only under the amendment as to the *scope* of review.

Thus, in F.E.L.A. cases tried in both state and federal courts, jury verdicts may be reviewed for excessiveness, and remittiturs required in proper cases. This latter rule concerns *what* may be done without doing violence to the substance of the right created under F.E.L.A. The question here presented is *who* may exercise a particular scope of review which, as has been stated, *someone* in the judicial system, either state or federal, may exercise. The Texas Rules of Civil Procedure grant to the Texas Court of Civil Appeals the right to exercise a scope of review, which as a substantive matter, *may* be exercised in F.E.L.A. cases, and respondent submits that the effects of such rules are merely procedural and that the claimant is denied no federal right by the application of such procedural rules.

Respondent's Counterpoint No. 3 Restated

3. The action of the Court of Civil Appeals in requiring a $40,000.00 remittitur in this case was supported by the record in the cause.

ARGUMENT AND AUTHORITIES

Respondent does not deem it appropriate, under the rules of this Court, on petition for certiorari to dwell at length on the merits of the cause. Attached hereto as an appendix is a partial synopsis of the medical evidence appearing in the Statement of Facts in the cause.

Taking together the synopsis of evidence presented in the appendix to Simmons' petition, which is quite understandably drawn most favorably to his position, the synopsis of the evidence contained in the appendix to this reply, the record as a whole, and the evidence as set forth in the Court of Civil Appeals' opinion previously referred to, we submit that it cannot be said that the Texas Court of Civil Appeals in this case clearly abused the discretion granted to it under the aforementioned Texas Rules of Civil Procedure.

SUMMARY

Jurisdiction:

Jurisdiction is denied. The requirement of a remittitur is not the denial of any federally guaranteed right of trial by jury in an F.E.L.A. case, whether such remittitur is required by the trial court, or an appellate court which has the same authority as a trial court under the rules of Texas practice. The remittitur required in this case by the Court of Civil Appeals was well supported in the record. No federal right of Simmons has been violated, nor has any substantial federal question here been presented.

Argument:

Although this Court has granted certiorari and decided numerous F.E.L.A. cases, holding that the rule of federal decision, and not local rules, apply in the situations there

involved, almost all such cases concerned the effect of local practice as to sufficiency of evidence and pleadings, and the presentation of liability issues to the jury. In such cases this court has taken pains to point out that it must clearly distinguish between substantive and procedural rules of local jurisdictions and that it will apply federal rules of decision only where the substance of the cause of action created by the F.E.L.A. is effected.

It has been held in numerous cases that the jury trial requirements of the Seventh Amendment do no apply to state courts. Simmons had an election to file his suit in either the state or federal court. Had he filed it in the federal court, and the trial court required a remittitur, no federal right would have been involved. Had a federal appellate court, within its scope of review as limited by the Seventh Amendment, found the verdict to be excessive and required a remittitur, no federal right would have been involved. Where he chooses to file his case in a state court where both the trial and appellate courts have the same scope of review concerning excessiveness of verdicts and requirements of remittitur, the requirement of a remittitur by either court under such rules does not deny him any federal right. It was not the intention of Congress, nor has it been the intention of this Court, that state courts should become federal courts when trying F.E.L.A. cases, the grant of jurisdiction being *concurrent* and not requiring the application of the identical procedural rules that are applied in federal courts.

The suggested remittitur of the Court of Civil Appeals in this case is well supported by the record. If it be determined that this Court has jurisdiction to review remittiturs required in all F.E.L.A. cases, then there is ample support

in the record for the action of the Court of Civil Appeals in this case. Certainly certiorari should not be granted in order to determine whether this Court would have acted *exactly* as the Court of Civil Appeals did in the exercise of its discretion. The test is whether there was a clear abuse of the discretion granted to the Court of Civil Appeals by the Constitution and Laws of the State of Texas.

Assuming the state courts, trial or appellate, do have jurisdiction to review verdicts for excessiveness and require remittiturs where proper in F.E.L.A. cases, then, the exercise of such judicial discretion would not be a proper subject for certiorari unless it is shown that there is a clear abuse, which has not been done by petitioner in this case...

CONCLUSION

Respondent respectfully submits that the petition for Writ of Certiorari should be denied or dismissed, there being no federal question involved.

Respectfully submitted,

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APPENDIX

PARTIAL SYNOPSIS OF MEDICAL EVIDENCE TAKEN FROM STATEMENT OF FACTS BELOW

At the time of his injury plaintiff was being paid at the rate of $17.22 per day as a fireman on a passenger train. (S.F. 6). In 1958, the year preceding his injury, Mr. Simmons made a little over $7,000.00 (S.F. 6). In 1957, Mr. Simmons made $7,400.00 (S.F. 6). In 1956, Mr. Simmons made $7,200.00 (S.F. 6). All this money was made as a fireman, except for a few days he worked as an engineer. (S.F. 7).

In 1942 Mr. Simmons began working for the railroad and under his own testimony he was about number 135 or 140 on the seniority list. (S.F. 8). At the time of his injury, in 1959, he was about 82 or 83 on the seniority list (S.F. 9). This was of course some 17 years later. There is no evidence that Mr. Simmons was in line for an immediate promotion and there is no evidence that he would have received a greater rate of pay at some later time.

Turning to the question of injuries received by Mr. Simmons, we must look to the testimony of Dr. Heinz K. Faludi. The testimony of this medical witness was introduced by the plaintiff himself. In other words, this doctor was plaintiff's own witness.

Dr. Faludi first examined the plaintiff on January 27, 1960 (S.F. 170). It was indicated to him, as revealed by the history taken down by him, that plaintiff was hurt on May 10, 1959, and that a disc between L4 and L5 had been removed on July 14, 1959 (S.F. 172).

As to the general health of the patient Dr. Faludi said that the patient had been treated for peptic ulcers off and on for the past eighteen years.

Dr. Faludi made an examination of the plaintiff and when asked to give the nature of the examination and the findings he stated:

> "I'll be happy to. I examined this patient and found that he is a forty-six-year-old white male patient. He appeared to be cooperative and pleasant during the examination. The patient was what we describe of asthenic habitus, which means that he is of a skinny type or somewhat slender type. He appeared to be in acute distress. When he walked, it would seem that he walked with a severe limp and he tended to protect his right leg. Examination of the head and neck were negative, the lungs seemed to be normal, heart examination was negative, blood pressure was one hundred and ten (110) over eighty (80), which is normal. Examination of the abdomen was essentially negative. On examining the patient's low back I found that he had an incisional scar in mid line extending from about L3 to S1 which appeared to have well healed. There was still tenderness over the lumbrosacral region of this incision." (S.F. 173-174).

The doctor further stated that his examination revealed that there was an indication of some involvement of the nerves in the lower back. In the doctor's opinion the patient most likely had a radiculitis involving the L5 and S1 nerve root on the right. Describing this condition the doctor said:

> "Radiculitis means involvement of the nerve root of L5 and S1 on the right, and with the history that I had obtained that this patient had a previous operation I felt most likely that radiculitis was secondary to the previous disc removal and operation and I felt

that these were residuals of the previous pathology which supposedly had been removed." (S.F. 180).

When asked about the treatment recommended the doctor stated:

"Yes, I recommended that this patient continue with conservative treatment and then I said only if completely unable to give the patient relief with conservative treatment that one should consider a re-exploration in order to free patient of the scar formation and possibly to perform a posterior rhizotomy—which is cutting the pain fibers of these nerves—if it were found that the root was irreparably damaged, in order to give the patient relief." (S.F. 180-182).

A myelogram was performed by Dr. Faludi and his testimony in this respect is as follows:

"Q. Tell us, Doctor, what you found as a result of your X-ray examination on the myelogram test,

A. Well, what we found was—when we performed this spinal puncture we found that the spinal fluid was clear; we found that the initial pressure of the spinal fluid was one hundred and forty millimeters, which can be considered normal; we found that the manometric tests which were performed on the spinal fluid were negative and there was no sign of any obstruction to the spinal fluid flow. When we introduced the pantopaque, which is the medicine we use to visualize this area, we found that the myelogram showed a questionable defect at the level of L4.

Q. You said at the level of L4; is that the fourth lumbar vertebra?

A. Fourth Lumbar Vertebra, that is right. And from the appearance of this X-ray defect we felt that

it was more likely that this patient had old scar formations around the nerve root rather than a new herniation of a disc, and it was my feeling that this patient apparently had residuals from his previous disc pathology and that he had formed scar formation compressing the lumbar nerve roots, particularly the L5 nerve root, which is the one that runs at the L5 vertebra on the right side.

Q. Why would scar formation form in that area, Doctor?

A. Well, scars may form after injuries and scars may form following surgery, and it may be that that scar was a residual from the previous surgery.

Q. Scar tissue is tissue the body puts out to replace normal tissue, is that right?

A. That is correct.

Q. Whenever you remove or damage or injure normal tissue, the body will seek to replace that normal tissue with scar tissue?

A. Yes, that is right; it is the body's way of repairing injury." (S.F. 186-188)

Concerning work after the alleged injury, the patient told the doctor that he worked at a liquor store for nine days but because of having to lift cases of beer, he had to quit. (S.F. 189).

The only evidence from this medical witness concerning the plaintiff's ability to work is as follows:

"Q. Doctor, in your opinion, based upon all of your observations of this man, in his present condition is he able to engage in work which requires sustained heavy lifting or stooping, bending, that sort of thing, heavy manual work?

A. I do not believe so, not in the condition he is in now." (S.F. 189)

It will be noted that the question was phrased in the term of heavy lifting and heavy manual labor and that the answer was given in the terms of the present and not the future. There is no direct medical testimony to show future disability. In fact, in all probability, the operation suggested by Dr. Faludi would have been successful and has proved to be in most cases (S.F. 194-200). It is even shown that if the suggested operation was successful plaintiff would be able to work as a fireman or engineer. (S.F. 204-205)